DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-770
Title: Chunon L. Bailey, aka Polo, Petitioner
v.
United States
Docketed: December 20, 2011
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (07-3719, 10-398)
Decision Date: July 6, 2011
Rehearing Denied: September 20, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 16 2011	Petition for a writ of certiorari filed. (Response due January 19, 2012)
Jan 12 2012	Order extending time to file response to petition to and including February 21, 2012.
Jan 19 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Feb 15 2012	Order further extending time to file response to petition to and including March 22, 2012.
Mar 19 2012	Order further extending time to file response to petition to and including April 5, 2012.
Mar 26 2012	Order further extending time to file response to petition to and including May 3, 2012.
May 3 2012	Brief of respondent United States in opposition filed.
May 14 2012	Reply of petitioner Chunon L. Bailey, aka Polo filed.
May 15 2012	DISTRIBUTED for Conference of May 31, 2012.
Jun 4 2012	Petition GRANTED.
Jun 8 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 3, 2012.
Jun 8 2012	The time to file respondent's brief on the merits is extended to and including September 17, 2012.
Jul 16 2012	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
Jul 23 2012	SET FOR ARGUMENT ON Tuesday, October 30, 2012.
Aug 2 2012	Transcripts received from U.S.D.C. for Eastern District of New York. (10 volumes)
Aug 3 2012	Joint appendix filed.
Aug 3 2012	Brief of petitioner Chunon L. Bailey, aka Polo filed.
Aug 10 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Aug 10 2012	Brief amici curiae of American Civil Liberties Union, et al. filed.
Aug 10 2012	Brief amicus curiae of National Association of Federal Defenders filed.
Aug 13 2012	Record from U.S.C.A. for Second Circuit is electronic.

Aug 15 2012	Record from U.S.D.C. for Eastern District of New York is electronic.
Aug 24 2012	CIRCULATED.
Aug 27 2012	Order further extending time to file respondent's brief on the merits to and including September 20, 2012.
Sep 20 2012	Brief of respondent United States filed. (Distributed)
Sep 27 2012	Brief amici curiae of Michigan, Twenty Three (23) Other States, and One (1) Territory filed. (Distributed)
Oct 15 2012	Reply of petitioner Chunon L. Bailey, aka Polo filed. (Distributed)
Nov 1 2012	Argued. For petitioner: Kannon K. Shanmugam, Washington, D. C. For respondent: Jeffrey B. Wall, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
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11 770

No.

In the Supreme Court of the United States

CHUNON BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, pursuant to *Michigan* v. *Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed.

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In the Supreme Court of the United States

No.

CHUNON BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Chunon Bailey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 652 F.3d 197. The court of appeals' order denying rehearing (App., *infra*, 21a) is unreported. The order of the district court denying petitioner's motion to suppress (App., *infra*, 22a-57a) is reported at 468 F. Supp. 2d 373.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on September 20, 2011 (App., *infra*, 21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]

STATEMENT

In *Michigan* v. *Summers*, 452 U.S. 692 (1981), this Court held that officers executing a search warrant for contraband may detain the occupants of the premises while the search is conducted. A substantial conflict has developed among federal courts of appeals and state courts of last resort on the question whether the rule of *Summers* extends to the detention of an individual who has left the immediate vicinity of the premises before the warrant is executed.

In this case, officers followed petitioner from the apartment to be searched and detained him approximately one mile away. During the detention, the officers discovered a key to the apartment on petitioner's person, and petitioner made statements linking himself to the apartment. In the course of the search, officers found guns and drugs, and petitioner was later charged with various federal offenses. The district court denied petitioner's motion to suppress the fruits of his detention, App., *infra*, 22a-57a, and petitioner was convicted. The court of appeals affirmed. *Id.* at 1a-20a. After recognizing the circuit conflict, the court held that the rule of *Summers* extends to the detention of an individual who has left the immediate vicinity of the premises. *Id.* at 9a-16a. Because the court of appeals' decision deepens the preexisting conflict and is incorrect, the petition for certiorari should be granted.

1. On the evening of July 28, 2005, officers from the Suffolk County, New York, police department obtained a warrant to search a basement apartment at the rear of a house at 103 Lake Drive in the hamlet of Wyandanch. The warrant identified a .38-caliber handgun as the principal object of the search. Based on information provided by a confidential informant, the warrant further indicated that the apartment was believed to be occupied by "a heavy set black male with short hair" known as Polo. App., *infra*, 3a, 23a.

Later that evening, before the warrant was executed, two officers sitting in an unmarked car were surveilling the property when they observed two men exiting from a gate at the top of stairs leading to the basement apartment. One of the men was petitioner; both men fit the general profile of the occupant described by the confidential informant. The officers watched as the men entered a car and drove away; petitioner was the driver. After the car was several hundred yards down the street, the officers followed in their car. In order to avoid alerting the men to their presence, the officers initially did not turn on their headlights. The officers followed the men for approximately one mile; during that time, they observed petitioner driving past two traffic lights and two stop signs and making multiple turns without committing any traffic infractions. App., *infra*, 3a-4a, 24a-25a; Pet. C.A. Br. 6-7.

About five minutes later, the officers pulled over the car and ordered the men to exit. The officers conducted a pat-down search of each man; they found no guns or contraband, but found and seized petitioner's keys, which he had placed in his pocket after the initial stop. One of the officers questioned petitioner; when the officer asked petitioner where he was coming from, he said

he was coming from his house at 103 Lake Drive. App., *infra*, 4a, 25a.

The men were then handcuffed. When petitioner asked why he was being arrested, the officer advised him that he was not under arrest, but that he was being detained incident to the execution of a search warrant at 103 Lake Drive. In response, petitioner said: "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your investigation." Other officers arrived in a marked patrol car and transported the men back to the scene. App., *infra*, 4a-5a, 26a.

By the time the men returned, officers had entered the apartment and observed a gun and drugs in plain view. Both men were placed under arrest. Officers subsequently found additional guns in the apartment; critically, they also discovered that one of the keys on petitioner's key ring opened the front door. App., *infra*, 5a, 26a-27a.

2. On April 6, 2006, a grand jury in the Eastern District of New York indicted petitioner on one count of possessing at least five grams of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii); one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1); and one count of using and carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Petitioner moved to suppress the key and his statements on the ground, *inter alia*, that they constituted the fruits of an invalid detention under the Fourth Amendment.

The district court denied petitioner's motion to suppress. App., *infra*, 22a-57a. As is relevant here, the court held that, although petitioner had been detained after leaving the immediate vicinity of the apartment, his detention was justified under *Summers* as the detention of an occupant incident to the execution of a search war-

rant. *Id.* at 28a-35a. The court reasoned that, because the officers had the authority to detain petitioner under *Summers* as he was leaving the residence, "they possessed that same authority to detain him approximately five minutes later after following him a short distance away from the residence for safety reasons, and then to transport him back to the scene of the search." *Id.* at 31a. The court acknowledged the existence of a circuit conflict on the issue, but "disagree[d] with the analysis" in cases from other circuits that had "declined to extend *Summers* to * * * detentions once the occupant of the residence has left the search scene." *Id.* at 33a n.4.

3. The case proceeded to trial. There, the central issue was whether the prosecution could link petitioner to the guns and drugs found in the apartment; there were no fingerprints on any of the guns, nor could any of the guns otherwise be traced to petitioner. Pet. C.A. Br. 14. In attempting to establish the requisite connection with petitioner, the government heavily relied on the key to the apartment and the statements petitioner made during his detention. *Id.* at 24-25.

After three days of deliberation, the jury found petitioner guilty on all three counts. He was sentenced to 30 years of imprisonment, to be followed by five years of supervised release. App., *infra*, 1a.

4. On appeal, petitioner renewed his contention that his detention was invalid under *Summers*, relying on the cases from other circuits that the district court had discounted. Pet. C.A. Br. 31-49. In response, the government did not attempt to reconcile the circuit conflict, but instead contended that the cases from other circuits were inconsistent with *Summers*. Gov't C.A. Br. 29.

The court of appeals affirmed. App., *infra*, 1a-20a. As is relevant here, the court of appeals held that "[petitioner's] detention during the search of his residence was

justified pursuant to [*Summers*] because he was (a) an occupant of the property subject to a valid search warrant, (b) seen leaving the premises during the execution of the warrant, and (c) detained as soon as reasonably practicable thereafter." App., *infra*, 19a.[1]

As a preliminary matter, the court of appeals reasoned that this case presented an issue not answered by *Summers*: *viz.*, "whether the same authority pursuant to which police officers may detain an occupant *at* the premises during the execution of a search warrant permits them to detain an occupant who *leaves* the premises during or immediately before the execution of a search warrant and is detained a few blocks away." App., *infra*, 10a. The court explained that, while it had previously upheld the detention of individuals in the immediate vicinity of the premises, "the question presented here is a matter of first impression in our Circuit." *Ibid.*

The Second Circuit then noted that "[t]his question has divided the Courts of Appeals." App., *infra*, 10a. "Of the five courts to consider it," the court continued, the Fifth, Sixth, and Seventh Circuits "have extended *Summers* on facts similar to those of this case." *Ibid.* On the other hand, the Eighth and the Tenth Circuits "have declined to extend *Summers* to permit detention of occupants who have been seen leaving a residence subject to a search warrant." *Id.* at 12a.

After reviewing the cases, the court of appeals "agree[d] with the District Court that the Fifth, Sixth

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[1] The court of appeals held petitioner's direct appeal in abeyance and then consolidated it with his appeal from the district court's denial of his motion to vacate sentence under 28 U.S.C. 2255. In the decision under review, the court of appeals rejected the ineffective-assistance claim that was the subject of the Section 2255 motion, see App., *infra*, 17a-19a, and that claim is not renewed in this petition.

and Seventh Circuits have the better of this argument." App., *infra*, 13a. According to the court of appeals, "[t]he guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the preservation of evidence." *Ibid.* The court contended that a contrary rule "would put police officers executing a warrant in an impossible position" and "strip law enforcement of the capacity to exercise unquestioned command of the situation at precisely the moment when *Summers* recognizes they most need it." *Id.* at 14a (internal quotation marks and citation omitted).

The court of appeals reasoned that "*Summers* imposes upon police a duty based on both geographic *and* temporal proximity; police must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search." App., *infra*, 15a. Because the court determined that "the officers acted as soon as reasonably practicable in detaining [petitioner] once he drove off the premises subject to search," it concluded that petitioner's detention did not violate the Fourth Amendment. *Id.* at 16a.[2]

5. The court of appeals subsequently denied rehearing. App., *infra*, 21a.

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[2] Although the district court had held in the alternative that petitioner's detention could be justified under *Terry* v. *Ohio*, 392 U.S. 1 (1968), the court of appeals expressly declined to consider that issue. See App., *infra*, 16a n.7.

REASONS FOR GRANTING THE PETITION

This is a paradigmatic case for the Court's review, presenting a deep and longstanding conflict among the federal courts of appeals and state courts of last resort on a question of constitutional law. In the decision below, the Second Circuit expressly recognized that conflict and sided with other circuits holding that, consistent with the Fourth Amendment, police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises to be searched. Not only does the Second Circuit's decision deepen the preexisting conflict, but its analysis is seriously flawed: the categorical rule of *Michigan* v. *Summers*, 452 U.S. 692 (1981), governing detentions incident to the execution of search warrants cannot comfortably be extended to situations in which the detention takes place away from the immediate vicinity of the premises subject to the search. And there is no impediment in this case to the Court's consideration and resolution of the question presented. This case readily satisfies the criteria for certiorari, and the petition should be granted.

A. The Decision Below Deepens A Conflict Among The Federal Courts Of Appeals And State Courts Of Last Resort

The Second Circuit's decision deepens a conflict involving the decisions of numerous other courts of appeals and state courts of last resort concerning the detention of individuals who have left the immediate vicinity of the premises to be searched. That conflict warrants this Court's review.

1. As the Second Circuit expressly recognized (App., *infra*, 12a-13a), the Eighth and Tenth Circuits have held that, pursuant to *Summers*, police officers may not de-

tain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises to be searched. In *United States* v. *Sherrill*, 27 F.3d 344 (8th Cir.), cert. denied, 513 U.S. 1048 (1994), police saw an individual leave a house that was about to be searched, get in his car, and drive away; they stopped him one block away, detained him, and brought him back to the house. *Id.* at 345-346. As is relevant here, the Eighth Circuit concluded that the detention could not be justified under *Summers*, on the grounds that (1) "the intrusiveness of the officers' stop and detention on the street was much greater" than it would have been in or around the house, and (2) "the officers had no interest in preventing flight or minimizing the search's risk because [the individual] had left the area of the search and was unaware of the warrant." *Id.* at 346. In so concluding, the Eighth Circuit followed its then-recent decision in *United States* v. *Hogan*, 25 F.3d 690 (1994), in which it had invalidated a detention that occurred three to five miles away on the ground that "none of the law enforcement interests set forth in *Summers* appl[ied]." *Id.* at 693.

In *United States* v. *Edwards*, 103 F.3d 90 (1996), the Tenth Circuit reached the same conclusion as *Sherrill* in a case involving almost identical facts (except that the individual was detained three blocks away). *Id.* at 94. Citing the Eighth Circuit's decision in *Sherrill*, the Tenth Circuit held that the prolonged detention of the individual was invalid. *Id.* at 93-94 & n.4. The court reasoned that "the police's legitimate law enforcement interest in preventing flight in the event that incriminating evidence was found was far more attenuated than in *Summers*," *id.* at 93-94, and "[n]either of the [other] *Summers* interests were served in any way by [the defendant's] extended detention," *id.* at 94.

In addition to the courts cited by the Second Circuit, one other court of appeals has concluded that *Summers* does not justify the detention of an individual who has left the immediate vicinity of the premises to be searched. In *United States* v. *Taylor*, 716 F.2d 701 (9th Cir. 1983), police saw an individual leave a house that was about to be searched, get in his car, and drive away; they stopped him, ordered him out of the car, and later forced him to lie face down in an adjoining ditch. *Id.* at 705. As is relevant here, the Ninth Circuit reasoned that "much of the justification for the rule announced in *Summers* is inapplicable to [the individual's] situation," because the detention was neither motivated by, nor likely to advance, the police's interests in preventing flight and completing an orderly search. *Id.* at 707. Although the court acknowledged that "[t]he applicability of *Summers* presents a close question," it ultimately concluded that "the detention of [the individual] cannot be justified" under *Summers*. *Ibid.*

Finally with respect to this side of the conflict, at least three state courts of last resort have held that, pursuant to *Summers*, police officers may not detain an individual who has left the immediate vicinity of the premises subject to the search. In *Commonwealth* v. *Charros*, 824 N.E.2d 809, cert. denied, 546 U.S. 870 (2005), the Massachusetts Supreme Judicial Court held, after extensive analysis, that *Summers* does not permit a detention which, like the one at issue here, occurred approximately a mile from the apartment to be searched. *Id.* at 815-818. In *Parks* v. *Commonwealth*, 192 S.W.3d 318 (2006), the Kentucky Supreme Court invalidated the detention of individuals five miles away; relying on *Sherrill* and *Edwards*, the court reasoned that the individuals "were not flight risks because they had no way of knowing that the warrant had been issued," and added that,

"because of their absence, they posed no danger to the officers conducting the search." *Id.* at 334. And in *State* v. *Hill*, 130 P.3d 1 (2006), the Kansas Supreme Court distinguished *Summers* where the detention took place some distance from the house to be searched, reasoning that the detention "did not prevent the risk of flight" and "was unnecessary to minimize the risk of harm to the officers executing the search warrant." *Id.* at 10.

2. By contrast, as the Second Circuit expressly recognized in joining them (App., *infra*, 10a-12a), three other courts of appeals—the Fifth, Sixth, and Seventh Circuits—have held that *Summers* permits the detention of an individual who has left the immediate vicinity of the premises to be searched. See *United States* v. *Cavazos*, 288 F.3d 706, 712 (5th Cir.), cert. denied, 537 U.S. 910 (2002); *United States* v. *Cochran*, 939 F.2d 337, 339 (6th Cir. 1991), cert. denied, 502 U.S. 1093 (1992); *United States* v. *Bullock*, 632 F.3d 1004, 1011 (7th Cir. 2011). Those cases present facts similar to those in the cases on the other side of the conflict; each of them involved the detention of an individual who had left the premises to be searched and was stopped in his vehicle some distance away.

In *Cavazos*, the Fifth Circuit upheld a detention two blocks away from the house, citing "the officers' belief that [the individual] presented a threat to the search" and specifically rejecting the individual's "attempts to distinguish the instant case from *Summers* on the basis of geographic proximity." 288 F.3d at 711, 712. In *Cochran*, the Sixth Circuit upheld a detention a short distance away; like the Second Circuit here, the Sixth Circuit expressly concluded that "*Summers* does not impose upon police a duty based on geographic proximity" but instead focuses on "whether the police detained defendant as soon as practicable." 939 F.2d at 339. And in *Bullock*,

the Seventh Circuit upheld the continued detention of an individual about ten to fifteen blocks away, on the ground that, once officers had initially detained the individual and told him about the warrant, he "became a flight risk and a potential risk to the officers' safety in executing the warrant." 632 F.3d at 1020.

In addition, since the court of appeals' decision in this case, the Fourth Circuit has joined those circuits in holding that *Summers* permits the detention of an individual who has left the immediate vicinity of the premises to be searched. See *United States* v. *Montieth*, No. 10-4264, ___ F.3d ___, 2011 WL 6016974 (4th Cir. Dec. 5, 2011). Recognizing the circuit conflict and heavily relying on the decision below, the Fourth Circuit rejected the argument that "it is unlawful for the police to detain a person incident to the execution of a warrant once he is almost a mile away from the residence." *Id.* at *4. Instead, the court reasoned, "[t]he law enforcement interests identified in *Summers* are no less salient here, where the stop and detention away from the home facilitated a safe and efficient execution of the search." *Id.* at *5.[3]

There are therefore a substantial number of courts on the Second Circuit's side of the conflict, as well as on the other side. That entrenched and widely recognized conflict, on a significant question of Fourth Amendment law, merits further review.[4]

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[3] Unlike the Second Circuit in this case, the Fourth Circuit held that the detention was also justified under *Terry* v. *Ohio*, *supra*. See *Montieth*, 2011 WL 6016974, at *4.

[4] This case does not present any question concerning the validity of a detention that occurs outside, but within the immediate vicinity of, the premises to be searched. In *Summers* itself, the individual was detained as he was coming down the front steps of the house.

B. The Decision Below Is Erroneous

The Second Circuit erred in extending the rule of *Summers* to permit the detention of an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises to be searched. That error warrants this Court's review and correction.

1. In *Summers*, this Court announced a "categorical" rule that officers executing a search warrant for contraband have the authority to detain the occupants of the premises while the search is being conducted. See *Muehler* v. *Mena*, 544 U.S. 93, 98 (2005). Professor LaFave has described *Summers* as the "most significant" of the exceptions to the ordinary mode of Fourth Amendment analysis, which requires case-by-case review of the reasonableness of a particular search or seizure. 2 Wayne R. LaFave, *Search and Seizure* § 4.9(e), at 726 (4th ed. 2004).

Application of the rule of *Summers* has substantial consequences: it authorizes the police to detain an "occupant" of the premises even if the individual has no apparent connection to the criminal activity being investigated; to detain the individual in appropriate restraints

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See 452 U.S. at 693. Accordingly, lower courts have consistently held that detentions that take place within the immediate vicinity of the premises are permissible. See, *e.g.*, *Williamson* v. *State*, 921 A.2d 221 (Md. 2007). In addition, lower courts on both sides of the conflict presented here have explained that situations in which a detention occurs within the immediate vicinity of the premises are analytically distinct from situations in which it occurs farther away. Compare *Charros*, 824 N.E.2d at 817 (distinguishing *Commonwealth* v. *Catanzaro*, 803 N.E.2d 287 (Mass. 2004)), with App., *infra*, 10a (distinguishing *United States* v. *Fullwood*, 86 F.3d 27 (2d Cir.), cert. denied, 519 U.S. 985 (1996)).

for the duration of the search, which can take hours; and to question the individual even on unrelated subjects. See *Muehler*, 544 U.S. at 100, 101. Put another way, when an individual falls within the scope of the *Summers* rule, there is no need to conduct any additional, case-specific inquiry concerning the justification for, or intrusiveness of, a particular detention. See *Summers*, 452 U.S. at 705 n.19. Precisely for that reason, any extension of the *Summers* rule should be closely scrutinized.

2. The court of appeals' decision to extend the *Summers* rule to individuals who have left the immediate vicinity of the premises to be searched cannot be reconciled with the reasoning of *Summers* itself. In *Summers*, the Court reasoned that, as a categorical matter, the detention of an individual who is present while the individual's own home is being searched is only incrementally more intrusive than the search itself. See 452 U.S. at 701-702. The Court further reasoned that there were three rationales for such a detention: (1) "preventing flight in the event that incriminating evidence is found"; (2) "minimizing the risk of harm to the officers"; and (3) "facilitat[ing]" "the orderly completion of the search." *Id.* at 702-703.

Where an individual is detained away from the immediate vicinity of the premises to be searched, the resulting intrusion is correspondingly more substantial, and the rationales for the detention are correspondingly less so. As to the intrusion: where the detention occurs not in the privacy of an individual's own home (or in the immediate vicinity) but in a public place away from the home, "the intrusiveness of the officers' stop and detention * * * [is] much greater." *Sherrill*, 27 F.3d at 346. Such a detention "produce[s] all the indignity of an arrest in full view of the public"—and, as such, is "hardly an incremental intrusion on personal liberty, but a signif-

icant deprivation of liberty far beyond what was contemplated in [*Summers*]." *Charros*, 824 N.E.2d at 816 (internal quotation marks and citation omitted).

As to the rationales for the detention: each of the three rationales articulated in *Summers* applies with less force where an individual is detained away from the immediate vicinity of the premises to be searched. First, the interest in preventing flight in the event that incriminating evidence is found is "far more attenuated" where, as here, the individual has already left the premises before the search has begun (and would therefore have no reason to know that a search is imminent). *Edwards*, 103 F.3d at 93-94; see *Sherrill*, 27 F.3d at 346. Although it is possible that the individual could *subsequently* learn of the search and go on the lam, that possibility cannot justify extension of the *Summers* rule; if it did, it would entirely untether *Summers* from its moorings and permit the detention of any individual who is an occupant of the premises upon issuance of the search warrant, regardless of where that individual is found. And the very act of following an individual away from the premises creates a risk that the individual will learn of the police's interest. Cf. *Bullock*, 632 F.3d at 1011 (upholding a detention where the individual learned of the search warrant *after* he was initially detained).

Second, the interest in minimizing the risk of harm to officers is barely served, if at all, when an individual has already left the premises, because such an individual poses a minimal risk, if any, to the officers executing the warrant. See, *e.g.*, *Hogan*, 25 F.3d at 693; *Hill*, 130 P.3d at 10; *Parks*, 192 S.W.3d at 334. In the unlikely event that the individual were to learn of the search and then return to the premises in an effort to prevent the search from occurring, the police would possess the ability to detain the individual under the rule of *Summers*. See

Hill, 130 P.3d at 10. And the acts of following an individual away from the premises, detaining the individual, and returning the individual to the scene all give rise to their own risks, both to the officers who engage in the pursuit and to the officers who remain at the scene.

Third, the interest in facilitating the orderly completion of the search dissipates when a detention takes place away from the premises. Of necessity, the pursuit and detention of an individual away from the premises diverts officers who might otherwise be involved in conducting the search. To the extent officers return a detained individual to the scene, it may complicate the search by increasing the number of people at the scene and diverting officers from the search to monitor the detained individual. And to the extent that having an occupant at the scene is helpful to facilitate the completion of the search (for example, by having the occupant unlock doors), the police can ensure the presence of the occupant either by executing the warrant before the occupant leaves or by waiting to execute it until the occupant returns. See *Charros*, 824 N.E.2d at 817.[5]

3. Finally, the overriding rationale for the *Summers* rule is to enable officers executing a search warrant to "exercise unquestioned command of the situation." *Muehler*, 544 U.S. at 99; *Summers*, 452 U.S. at 703. That rationale justifies the detention of individuals whom the police encounter in the course of executing a search war-

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[5] In this case, the detaining officers testified that they acted as they did out of concern that, if they had apprehended the men in the driveway, it might have alerted others in the apartment (or neighbors) to the presence of law enforcement. App., *infra*, 4a n.3, 24a. To the extent that was a serious concern, however, the officers simply ignored another option: *viz.*, to allow the men to leave and then execute the warrant.

rant (whether on their way into the premises or once inside), because the police cannot reasonably be expected, in "the inherent volatility produced by the search environment," to stop and determine whether those individuals are potential suspects or innocent bystanders. *Charros*, 824 N.E.2d at 817. By contrast, the detention of an individual away from the immediate vicinity of the premises to be searched arguably hinders, rather than helps, the safe and efficient execution of the warrant.

More broadly, extending the *Summers* rule "effectively would eliminate any meaningful relation between the place of the seizure and the premises to be searched" and "would give officers authority to act in anticipation of the execution of a warrant comparable to making an arrest without having to meet the requirements of an arrest." *Charros*, 824 N.E.2d at 817-818. Such an extension would allow the *Summers* exception to swallow the ordinary Fourth Amendment standard, by obliterating the need for an individualized justification for detention.

* * * * *

In sum, the Second Circuit's extension of the *Summers* rule not only deepens an entrenched and widely recognized conflict in the lower courts; it is inconsistent with *Summers* itself. The Court should grant review on this important question of Fourth Amendment law and reject the overly expansive view of *Summers* adopted by the Second Circuit and others.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 07-3719 & 10-398

UNITED STATES OF AMERICA, Appellee,

v.

CHUNON L. BAILEY, also known as Polo,
Defendant-Appellant.

Argued: Feb. 14, 2011
Decided: July 6, 2011

Before: CABRANES, POOLER and RAGGI, Circuit Judges.

JOSÉ A. CABRANES, Circuit Judge:

Chunon L. Bailey appeals from an August 23, 2007 judgment of conviction entered by the United States District Court for the Eastern District of New York (Joseph F. Bianco, Judge), sentencing him principally to concurrent terms of 300 and 120 months of imprisonment, a consecutive term of 60 months of imprisonment, and five years of supervised release. Bailey was convicted, following a jury trial, of possession with intent to distribute at least five grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii), possession

of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). Bailey also appeals from a January 19, 2010 order by the District Court denying a motion to vacate his conviction pursuant to 28 U.S.C. § 2255 ("§ 2255"). *United States v. Bailey*, No. 06-cr-232, 2010 WL 277069 (E.D.N.Y. Jan. 19, 2010).[1]

We are asked to decide two questions: (1) whether the District Court erred in denying Bailey's motion to suppress evidence obtained during his detention because the search and seizure of Bailey's person and property were conducted in violation of his rights under the Fourth Amendment to the United States Constitution; and (2) whether the District Court erred in denying Bailey's § 2255 motion because he received constitutionally ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution. We hold that Bailey's detention during the search of his residence was justified pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981). The District Court therefore did not err in denying his motion to suppress evidence obtained during that detention. We also hold that Bailey failed to demonstrate, as he must in order to prevail, that his counsel's alleged ineffective assistance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 693–94 (1984). The District Court therefore did not err in denying Bailey's § 2255 motion. The District Court's August 23, 2007 judgment of conviction and its January 19, 2010 order denying the § 2255 motion are affirmed.

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[1] On January 30, 2008, we granted Bailey's motion to hold his appeal from the judgment of conviction in the District Court in abeyance so that he could file a petition pursuant to § 2255. We subsequently granted Bailey's motion to restore that appeal and consolidate it with a new appeal from the adjudication of the § 2255 motion.

BACKGROUND

The following facts reflect the findings entered by the District Court in the proceedings below, *see United States v. Bailey*, 468 F. Supp. 2d 373, 376–78 (E.D.N.Y. 2006) (motion to suppress); *Bailey*, 2010 WL 277069, at *2–3 (§ 2255 motion), and, unless otherwise indicated, are not in dispute.

A.

At 8:45 p.m. on July 28, 2005, Detective Richard Sneider ("Sneider") of the Suffolk County Police Department ("SCPD") obtained a search warrant from the First District Court in the Town of Islip, New York for the "basement apartment of 103 Lake Drive" in Wyandanch, New York, on the basis of information from a confidential informant. The search warrant provided that the apartment was "believed to be occupied by an individual known as 'Polo', a heavy set black male with short hair," and identified a "chrome .380 handgun" as the principal target of the search. The search warrant also stated that the basement apartment at 103 Lake Drive is "located at the rear of the premises[.]" The search warrant did not specify that access to the basement door at the rear of the house at 103 Lake Drive is possible from both the basement apartment and from the house upstairs.

At approximately 9:56 p.m. that evening, Sneider and Detective Richard Gorbecki ("Gorbecki"), an eighteen-year veteran of the SCPD assigned to the special operations team for narcotics enforcement, observed two men—later identified as Chunon L. Bailey (the defendant) and Bryant Middleton ("Middleton")—exiting the gate at the top of the stairs that led down to the basement of 103 Lake Drive. Both Bailey and Middleton matched the description of "Polo" provided to Sneider by

the confidential informant. They exited the yard of the house and entered a black Lexus parked in the driveway. Rather than confront Bailey and Middleton within view or earshot of the apartment, Sneider and Gorbecki watched as Bailey's car pulled out of the driveway and proceeded down the block.[2] After the car traveled about a mile from the house, the officers pulled the car over in the parking lot of a fire station.[3] Approximately five minutes elapsed between Bailey's exit from the basement apartment at 103 Lake Drive and the stop.

After pulling over the vehicle, the detectives conducted a "pat-down" of the driver, Bailey, and passenger, Middleton, to check for hard objects that could be used as weapons. At Sneider's request, Bailey identified himself and produced a driver's licenses bearing a Bay Shore, New York address. Nevertheless, he told Sneider that he was coming from his house at "103 Lake Drive" in Wyandanch, New York.

Middleton also identified himself and told Gorbecki that Bailey was driving him home in order to comply with a 10:00 p.m. curfew imposed as a condition of Middleton's parole. Middleton stated that Bailey's residence was 103 Lake Drive. At that point, the officers placed

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[2] Sneider and Gorbecki both testified that the decision not to confront Bailey and Middleton in the driveway at 103 Lake Drive was motivated by safety concerns, particularly the desire to avoid alerting other individuals who may have been in the apartment to the presence of law enforcement.

[3] The detectives explained that they waited about one mile to stop the car rather than detain Bailey and Middleton immediately in order to prevent people in the apartment or neighbors passing by from seeing the stop. In addition, once the Lexus turned off Lake Drive and the detectives were able to get directly behind the vehicle, they waited until the vehicle had passed through an intersection and had turned off of a crowded street before conducting the stop.

Bailey and Middleton in handcuffs and—in response to Bailey's inquiry as to why they were being "arrested"—informed both men that they were being detained, but not arrested, incident to the execution of a search warrant in the basement apartment of 103 Lake Drive. To that, Bailey responded, "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your investigation."

Gorbecki drove Bailey's Lexus back to 103 Lake Drive, while Bailey and Middleton were transported back in a patrol car. Upon arrival, Bailey and Middleton were informed that, during the search, the SCPD "entry team" had discovered a gun and drugs in plain view in the apartment. Bailey and Middleton were placed under arrest and Bailey's house and car keys were seized incident to arrest. Later that evening, an SCPD officer discovered that one of the keys on Bailey's key ring opened the door of the basement apartment. In total, less than ten minutes elapsed between Bailey's stop and his formal arrest.

B.

The evidence obtained during the search of Bailey's home and his statements to detectives Sneider and Gorbecki provided the basis for the government's indictment. Bailey moved, through counsel, to suppress the physical evidence (including his house and car keys) and his statements to detectives Sneider and Gorbecki, on the theory that he was unlawfully detained and searched in violation of the Fourth Amendment.

After holding an evidentiary hearing, the District Court found Bailey's detention lawful under *Michigan v. Summers*, 452 U.S. 692 (1981). *See Bailey*, 468 F. Supp. 2d at 378–82. The District Court reasoned that the detectives' authority under *Summers* to detain Bailey incident

to a search of the apartment was not strictly confined to the physical premises of the apartment so long as the detention occurred as soon as practicable after Bailey departed 103 Lake Drive. *Id.* at 382. Moreover, the District Court concluded, in the alternative, that Bailey's detention was lawful as an investigative detention supported by reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968). *Id.* at 383–85.

A nine-day trial with respect to Count One (possession with intent to distribute more than five grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii)) and Count Three (possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i)) commenced on October 30, 2006. On November 8, 2006, the jury returned a guilty verdict with respect to both Counts.[4]

On December 5, 2008, Bailey filed a motion pursuant to § 2255 seeking to vacate his conviction and order a new trial. Bailey's sole argument was that his trial counsel provided constitutionally ineffective assistance by failing to introduce evidence that access to the basement door at the rear of 103 Lake Drive could be gained from *either* the basement apartment *or* the house upstairs. Bailey asserted that when detectives Sneider and Gorbecki observed Bailey exit the gate at the back of the property on July 28, 2005, they could not have known whether he was leaving the basement apartment (for which they had a search warrant) or the house upstairs (for which they did not). Bailey argued that this distinction was determinative in the District Court's adjudica-

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[4] At Bailey's request, the Court bifurcated the trial, trying Bailey first for Counts 1 and 3, and then for Count 2 (possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2)). He was ultimately found guilty of all three counts.

tion of the suppression motion because the government could not sustain his detention under *Summers* or provide the reasonable suspicion to sustain his detention under *Terry* without demonstrating conclusively that Bailey had emerged from the basement apartment.

The District Court concluded that, even if the detectives had known that access to the basement hallway was possible from an apartment other than the basement apartment, they still would have had a reasonable basis to believe that Bailey and Middleton might have emerged from the property for which they had a search warrant. The detectives therefore had the authority under *Summers* to briefly detain Bailey in order to ascertain whether he was an occupant of the premises being searched. Indeed, as it turned out, the "undisputed evidence at the trial [was] that this door to the main house was not accessible to the basement tenant and that the main house was sealed off from the basement area." *United States v. Bailey*, 2010 WL 277069, at *10 (E.D.N.Y. Jan. 19, 2010).

Because the evidence regarding the layout of the house had no effect on the lawfulness of Bailey's detention, the District Court reasoned that Bailey had not demonstrated any prejudice from his counsel's alleged failure to offer that evidence. Accordingly, Bailey had failed to satisfy the requirement of *Strickland* that a successful claim for ineffective assistance of counsel demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

Bailey appeals from the final judgment of conviction entered by the District Court on August 22, 2007, as well as from the January 19, 2010 order denying Bailey's motion to vacate the conviction pursuant to § 2255. On appeal, he makes substantially the same claims he made

before the District Court in his suppression and § 2255 motions. However, he limits his arguments on appeal to the lawfulness of his detention pursuant to *Summers* and *Terry* and the adequacy of his assistance at trial. Appellant Br. 31, 49, 55.[5]

DISCUSSION

A.

Appeals from the denial of a motion to suppress evidence and a motion to vacate a conviction pursuant to § 2255 are both governed under the same standard of review: we review the District Court's factual findings for clear error and its conclusions of law *de novo*. *United States v. Lucky*, 569 F.3d 101, 105–06 (2d Cir. 2009) (reviewing a suppression motion); *Sapia v. United States*, 433 F.3d 212, 216 (2d Cir. 2005) (reviewing a § 2255 motion). A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quotation marks omitted); *accord United States v. Kilkenny*, 493 F.3d 122, 125 (2d Cir. 2007).

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[5] Although Bailey argues that his statements to the detectives and his keys should be suppressed as the fruit of an unlawful detention, he has abandoned his separate Fifth Amendment challenge regarding his statements and his Fourth Amendment challenge regarding the seizure of his keys and car during the stop. *See Bailey*, 468 F. Supp. 2d 373, 385–93. Bailey raised both of those issues before the District Court but does not reassert them on appeal. *See, e.g.*, *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 294 (2d Cir. 2008); *Hobbs v. Cnty. of Westchester*, 397 F.3d 133, 147 (2d Cir. 2005) (issues not raised on appeal are deemed abandoned).

B.

The basic parameters of our inquiry into the lawfulness of a challenged seizure are well-known. *See, e.g.*, *United States v. Julius*, 610 F.3d 60, 64 (2d Cir. 2010). The Fourth Amendment proscribes "unreasonable searches and seizures." In the absence of probable cause, a limited and temporary detention is generally permissible only if law enforcement can establish reasonable suspicion based on "specific and articulable facts" as measured by an objective standard. *Terry*, 392 U.S. at 21–22. The Fourth Amendment, however, "imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Instead, as in all questions under the Fourth Amendment, "the touchstone" of our analysis "is reasonableness." *Palacios v. Burge*, 589 F.3d 556, 562 (2d Cir. 2009) (quoting *Samson v. California*, 547 U.S. 843, 855 n.4 (2006)) (alteration and emphasis omitted).

In *Michigan v. Summers*, 452 U.S. 692 (1981), the Detroit police encountered George Summers descending the front steps of his house while they were preparing to execute a search warrant of the premises. Summers was detained during the search and subsequently arrested when narcotics were found in the house. *Id.* at 693. The Supreme Court upheld the initial detention, explaining that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705. That is, the Court concluded that the detention of "occupants" even without individualized suspicion during the execution of a valid search warrant is reasonable under the Fourth Amendment.

The *Summers* Court explained that compared with "the inconvenience [and] the indignity associated with a compelled visit to the police station," *id.* at 702, the character of the "incremental intrusion" caused by detention is slight and the justifications for detention are substantial. *Id.* at 703. In particular, the Court justified the detention of George Summers by reference to the interests of law enforcement in (1) "preventing flight in the event that incriminating evidence is found"; (2) "minimizing the risk of harm to the officers"; and (3) facilitating "the orderly completion of the search." *Id.* at 702–03. Moreover, the Court observed that once "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime[,] . . . [t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Id.* at 703–04.

We are now asked to decide whether the same authority pursuant to which police officers may detain an occupant *at* the premises during the execution of a search warrant permits them to detain an occupant who *leaves* the premises during or immediately before the execution of a search warrant and is detained a few blocks away. While we have extended *Summers* to permit the detention of individuals entering a vehicle in the driveway of a house, *see United States v. Fullwood*, 86 F.3d 27, 29–30 (2d Cir. 1996), the question presented here is a matter of first impression in our Circuit.

This question has divided the Courts of Appeals. Of the five courts to consider it, three have extended *Summers* on facts similar to those of this case. In *United States v. Cochran*, 939 F.2d 337 (6th Cir. 1991), for example, police officers went to the defendant's residence to execute a search warrant and observed the defendant

leaving the premises. *Id.* at 338. The officers did not want to forcibly enter the premises knowing that there was a guard dog inside, and they therefore stopped the defendant shortly after he exited the house. *Id.* The Sixth Circuit, relying on *Summers*, held that the detention was reasonable, concluding that "*Summers* does not impose upon police a duty based on geographic proximity ([*i.e.*,] defendant must be detained while still on his premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence." *Id.* at 339.

Similarly, in *United States v. Cavazos*, 288 F.3d 706 (5th Cir. 2002), police officers were conducting pre-execution surveillance when the defendant and two others left the residence in a truck. *Id.* at 708. The officers followed. *Id.* After the driver of the truck demonstrated his awareness that he was being followed, the officers stopped the vehicle, took the defendant back to the residence, and detained him during the search. *Id.* The Fifth Circuit observed that, because the defendant's conduct "warranted the belief that [the defendant] would have fled or alerted the other occupants of the residence about the agents nearby if he were released immediately after the stop and frisk," the detention was justified under *Summers*. *Id.* at 711. Moreover, the Court concluded that the nexus between the defendant and the residence gave officers an "easily identifiable and certain basis for determining that suspicion of criminal activity justifie[d] a detention of that occupant." *Id.* (quoting *Summers*, 452 U.S. at 703–04).

Most recently, in *United States v. Bullock*, 632 F.3d 1004 (7th Cir. 2011), officers conducting pre-execution surveillance observed the defendant exit the house and enter a vehicle with the resident of the house and her

children. *Id.* at 1009. Officers followed the vehicle and executed a stop about ten to fifteen blocks from the house, transporting all of the occupants of the vehicle back to the house after notifying the driver that a search was underway. *Id.* The Seventh Circuit concluded that—in the absence of anything "to suggest that the vehicle was not pulled over as soon as practicable"—the conduct of the officers was reasonable. *Id.* at 1020. The Court observed that "[o]nce aware of the warrant, [Bullock] became a flight risk and a potential risk to the officers' safety in executing the warrant given his suspected illegal association with the residence." *Id.*

Two circuits have declined to extend *Summers* to permit detention of occupants who have been seen leaving a residence subject to a search warrant. In *United States v. Sherrill*, 27 F.3d 344 (8th Cir. 1994), officers were conducting pre-execution surveillance when the defendant left the premises. *Id.* at 345. The officers stopped him a block away, informed him that they had a warrant to search the house, and detained him during the search. *Id.* at 345–46. The Eighth Circuit determined that, because the defendant had left the area and was unaware of the warrant, the officers did not have any interest in preventing his flight; the Court therefore held that *Summers* was inapplicable. *Id.* at 346. Nevertheless, the Court concluded that the police had probable cause to arrest the defendant; in light of the legal arrest, "the crack and cash discovered in a later search of his person was legally seized as a search incident to arrest." *Id.* at 347.

Second, in *United States v. Edwards*, 103 F.3d 90 (10th Cir. 1996), police were conducting pre-execution surveillance of a "drug house" when the defendant, an ex-convict in a drug rehabilitation program, left the building. *Id.* at 91. The officers detained him on the

street for forty-five minutes. *Id.* Like the Eighth Circuit in *Sherrill*, the Tenth Circuit concluded that because the defendant was unaware that a warrant was being executed, he had no reason to flee. *Id.* at 94. Furthermore, the Court reasoned that the defendant did not pose a risk of harm to the officers and his detention played no part in facilitating the orderly completion of the search. *Id.*

We agree with the District Court that the Fifth, Sixth and Seventh Circuits have the better of this argument. The guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the preservation of evidence. *See Summers*, 452 U.S. at 701. We agree with the District Court that "[t]here is no basis for drawing a 'bright line' test under *Summers* at the residence's curb and finding that the authority to detain under *Summers* always dissipates once the occupant of the residence drives away." *Bailey*, 468 F. Supp. 2d at 379; *see also Michigan v. Chesternut*, 486 U.S. 567, 572 (1988) (eschewing a bright-line rule in favor of a totality-of-the-circumstances approach in the determination of the reasonableness of a seizure under the Fourth Amendment); *United States v. Vargas*, 369 F.3d 98, 101 (2d Cir. 2004) (applying a totality-of-the-circumstances approach to determine the legality of a warrantless search and seizure); *United States v. Adegbite*, 877 F.2d 174, 178 (2d Cir. 1989) (same).

While the Eighth and Tenth Circuits apparently concluded that once an occupant leaves a premises subject to search without knowledge of the warrant, *Summers* is inapplicable because he ceases to (1) be a threat to the officers' safety, (2) be in a position to destroy evidence, or (3) be able to help facilitate the search, *see Summers*,

452 U.S. at 703–04; *Edwards*, 103 F.3d at 94; *Sherrill*, 27 F.3d at 346, we conclude that it is the very interests at stake in *Summers* that permit detention of an occupant nearby, but outside of the premises. Indeed, adopting the Eighth and Tenth Circuits' view as the law of the Circuit would put police officers executing a warrant in an impossible position: when they observe a person of interest leaving a residence for which they have a search warrant, they would be required either to detain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered). *See, e.g., United States v. Gori*, 230 F.3d 44, 55 (2d Cir. 2000) ("The police could assume that once alerted, the occupants might have disposed of the contraband by the window or the toilet, or might have precipitated violence."). *Summers* does not necessitate that Hobson's choice, particularly when "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime." *Summers*, 452 U.S. at 703. Indeed, to accept that argument would be to strip law enforcement of the capacity to "exercise unquestioned command of the situation," *id.*, at precisely the moment when *Summers* recognizes they most need it.

The District Court was therefore correct when it noted that "*Summers* . . . appl[lies] with equal force when, for officer safety reasons, police do not detain the occupant on the curbside, but rather wait for him to leave the immediate area and detain him as soon as practicable." *Bailey*, 468 F. Supp. 2d at 381 n. 4.[6] That is,

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[6] Indeed, "[a]t least two of the law enforcement interests articulated in *Summers* applied here—namely, prevention of flight should incriminating evidence be found during the search and minimizing the risk of harm to the officers." *Bailey*, 468 F. Supp. 2d at 379.

Summers imposes upon police a duty based on both geographic *and* temporal proximity; police must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search. As the Fifth Circuit concluded in *Cavazos*, while "[t]he proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply *Summers*, . . . it is by no means controlling." 288 F.3d at 712.

Against that standard, we have no trouble concluding that Bailey's detention was lawful under the Fourth Amendment. The officers' decision to wait until Bailey had driven out of view of the house to detain him out of concern for their own safety and to prevent alerting other possible occupants was, in the circumstances presented, reasonable and prudent. There is no question that because the target of the search warrant was a gun, Bailey—who matched the description of "Polo" provided by the confidential informant—posed a risk of harm to the officers. As the Supreme Court stated in *Summers*, "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." 452 U.S. at 702. In light of the fact that the officers had reason to suspect that the occupant of 103 Lake Drive sold drugs out of the house and had a gun in his possession, it was reasonable for the officers to assume that detaining Bailey outside the house might lead to the destruction of evidence or unnecessarily risk the safety of the officers. *See Stewart v. United States*, 101 F.3d 1392, 1392 (2d Cir. 1996) (citing *Summers*, 452 U.S. at 702). These are precisely the concerns that justified the limited intrusion in *Summers*. 452 U.S. at 701–03.

Finally, Bailey's detention was not "unreasonably prolong[ed]." *United States v. Harrison*, 606 F.3d 42, 45

(2d Cir. 2010) (citing *United States v. Turvin*, 517 F.3d 1097, 1103–04 (9th Cir. 2008)). He was detained for less than ten minutes before he was taken back to 103 Lake Drive. By the time he returned to the site of the search, the search was underway and he was formally placed under arrest within five minutes of the entry team's execution of the warrant. *See, e.g.*, *Muehler v. Mena*, 544 U.S. 93, 100 (2005) (finding two- to three-hour detainment of occupant in handcuffs reasonable while police searched premises because such detention did not outweigh government's continuing safety interests); *Fullwood*, 86 F.3d at 29–30 (finding fifteen-to twenty minute detainment of occupant during the execution of a search warrant reasonable under *Summers*). Of equal importance, officers did not attempt to exploit the detention by trying to obtain additional evidence from Bailey during execution of the search warrant. *See Summers*, 452 U.S. at 701 (stating that detaining an occupant during execution of a search warrant is "not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention"); *see also Bullock*, 632 F.3d at 1021 (same).

Because the officers acted as soon as reasonably practicable in detaining Bailey once he drove off the premises subject to search, we conclude that his detention during the valid search of the house did not violate the Fourth Amendment. The District Court did not err in denying Bailey's motion to suppress the evidence obtained as a result of his detention. *Bailey*, 468 F. Supp. 2d at 382.[7]

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[7] Because Bailey's detention was reasonable pursuant to *Summers*, we need not decide whether it was also reasonable pursuant to *Terry*. *See Bailey*, 468 F. Supp. 2d at 382–85.

C.

We turn now to Bailey's argument that he received ineffective assistance of counsel under *Strickland* because his trial counsel failed to establish that the layout of the premises subject to a search warrant—here, 103 Lake Drive—made it impossible for Sneider and Gorbecki to know *with certainty* whether Bailey had, in fact, emerged from the basement apartment, or had used the basement to exit the main house.

The standard for ineffective assistance of counsel is well established: a prisoner must show both (1) that counsel's performance was objectively unreasonable; and (2) that the unreasonable performance resulted in prejudice. *Strickland*, 466 U.S at 687, 693–94. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," considering "the totality of the evidence before the judge or jury." *Id.* at 694–95. As the Supreme Court observed in *Hill v. Lockhart*, the prejudice requirement under *Strickland* is predicated on the Court's "conclusion that an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 474 U.S. 52, 57 (1985) (quotation marks and alteration omitted).

We agree with the District Court that Bailey has failed to demonstrate prejudice. *Bailey*, 2010 WL 277069, at *11–15. Here, a confidential informant went with police to defendant's residence prior to the search and specifically identified for police that the back door of the house was the door to the defendant's apartment. *See Bailey*, 2010 WL 277069, at *10; App. at 181–82. Moreover, during the visit the police were able to view the

physical lay-out of the property's exterior, which revealed that access to the gate through which Bailey and Middleton exited was only possible through the basement door. App. at 181–82. Under those circumstances it would have been reasonable for the officers to stop Bailey even if they had known that, while unlikely, it was theoretically possible that he had emerged from the upstairs apartment. As the District Court concluded, "[t]he fact that someone from the main house could possibly have decided to use that rear basement door to exit the house (without having been an occupant of the basement apartment) does not mean that the police have no legal authority to detain individuals emerging from the rear basement door at the time of the search in order to ascertain whether they are residents or occupants of the basement apartment." *Id.* at *13. Accordingly, the fact that police appear to have erroneously assumed that the basement door was *only* accessible from the basement apartment is of no constitutional significance.[8]

We therefore conclude, as the District Court did, that even if defense counsel's failure to introduce evidence regarding the layout of 103 Lake Drive constitutes objectively unreasonable performance—a question on which we intimate no view—the introduction of that evidence would not have altered the police's authority to detain Bailey under *Summers*. The District Court there-

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[8] In this case, the design of the house and apartment at 103 Lake Drive justified Bailey's detention because it was reasonable for law enforcement to believe that Bailey was an occupant of the basement apartment and to stop him to confirm that belief. We intimate no view on how our analysis might change in circumstances where the property subject to search was located in a larger housing structure containing more than two housing units, such as an apartment building.

fore correctly denied Bailey's motion for a new trial pursuant to § 2255.

* * *

We end on a note of caution. *Summers* is not a license for law enforcement to detain "occupants" of premises subject to a search warrant anywhere they may be found incident to that search. Instead, we hold today that Summers authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected *as soon as reasonably practicable*. In fashioning this rule in this Circuit, we trust that both the geographic and temporal limitations will be policed vigilantly by the courts in order to ensure that *Summers* is applied within the boundaries specified by the Supreme Court.

CONCLUSION

To summarize, we conclude that:

(1) Bailey's detention during the search of his residence was justified pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981), because he was (a) an occupant of property subject to a valid search warrant, (b) seen leaving the premises during the execution of the warrant, and (c) detained as soon as reasonably practicable thereafter.

(2) Because the introduction of evidence regarding the layout of Bailey's residence would not have altered the District Court's analysis of the reasonableness of his stop under *Summers*, Bailey failed to demonstrate, as he must in order to prevail under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), that his counsel's alleged ineffective assistance was prejudicial.

The District Court's August 23, 2007 judgment of conviction and its January 19, 2010 order denying Bailey's § 2255 motion are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 07-3719 & 10-0398

UNITED STATES OF AMERICA, Appellee,

v.

CHUNON L. BAILEY, also known as Polo,
Defendant–Appellant.

September 20, 2011

Appellant Chunon L. Bailey filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

Catherine O'Hagan Wolfe, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 06-232

UNITED STATES of America,

v.

CHUNON L. BAILEY, Defendant.

September 6, 2006

MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge:

Defendant Chunon Bailey was indicted on April 6, 2006 in three counts, all relating to the events of July 28, 2005. Count One charges that Bailey possessed with intent to distribute at least 5 grams of cocaine base, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(B)(iii). Count Two charges Bailey with being a felon in possession of one or more firearms, in violation of Title 18, United States Code, Section 922(g)(1). Count Three charges Bailey with using and carrying firearms in relation to a drug trafficking crime, in violation of Title 18, United States Code, Section 924(c)(1)(A)(i).

Bailey has moved to suppress physical evidence and statements obtained on the day of his arrest, arguing

that: (1) the police had no authority to detain him, pursuant to the execution of a search warrant at a residence, once they allowed him to leave the immediate area of the residence that was about to be searched; (2) any statements made during that detention were obtained in violation of his constitutional rights because the officers failed to advise him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966); and (3) the police had no authority to seize his keys during such detention. On July 27, 2006, the Court heard argument on Bailey's motion and, on August 2, 2006, the Court conducted an evidentiary hearing regarding the motion. For the reasons that follow, the motion is denied.

I. FACTS

The two law enforcement officers who detained Bailey on the day of his arrest testified at the hearing. Bailey called no witnesses. After evaluating the credibility and demeanor of the witnesses, and the other evidence offered at the hearing, the Court makes the following findings of fact.

On July 28, 2005, the Suffolk County Police Department obtained a search warrant, issued by Judge Lotto of the First District Court in the Town of Islip, New York, authorizing the search for a .380 handgun at the rear basement apartment (hereinafter, the "apartment" or "residence") in a house located at 103 Lake Drive, Wyandanch, New York. In connection with the search, the officers executing the search warrant had a general description from an informant regarding the individual who occupied that apartment—namely, "a heavy set black male with short hair" and the name "Polo." (Tr. 15–16, 49–50; Ex. 1.)[1]

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[1] "Tr." refers to citations to the transcript of the August 2, 2006

The search warrant was executed later that evening. At approximately 9:56 p.m., shortly before the execution of the search warrant, Suffolk County Police Detectives Richard Gorbecki and Richard Sneider were in an unmarked vehicle outside the residence conducting pre-search surveillance and observed two individuals (one later identified as defendant Chunon Bailey) leave the gated area that leads only to the basement apartment and enter a black Lexus in the driveway of the residence. Both individuals matched the general physical description provided by the confidential informant in connection with the search warrant. For safety reasons, including a desire to avoid having the defendant potentially alert others in the apartment to the presence of law enforcement, the detectives did not detain the two individuals in the driveway or in sight of the residence; rather they let them drive away and followed the black Lexus for approximately one mile (which took less than five minutes) and stopped the car in the vicinity of the Wyandanch Fire Department. In particular, the detectives were concerned that, if any people who remained inside the residence saw that individuals leaving the residence were being stopped, they could arm themselves or destroy evidence prior to the search. (Tr. 15–18, 51–54.)

The detectives explained that they waited about one mile to stop the car rather than detain them immediately to prevent people in the residence and people passing down the block going to the residence, from seeing them stop the car. In addition, once the Lexus was off the block and they were able to get directly behind the vehicle, they were located at a busy intersection and, rather than conduct the stop at that busy intersection, the detectives decided to wait until the Lexus turned off that

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suppression hearing and "Ex." refers to exhibits admitted during that hearing.

busy road and then conducted the stop at the firehouse. At no time while the detectives were following the Lexus was the Lexus out of the detectives' sight. (Tr. 19–20, 37, 39, 54.)

After the car was stopped by the detectives, the two occupants were told to step out of the vehicle and to go to the back of the car. They were then patted down to determine if they possessed any weapons. The detectives were particularly concerned about weapons given that the focus of the search warrant was a handgun. As part of the pat-down, hard items were removed from their person including, as to Bailey, his keys on a key ring (including the key to the car) in his front left pocket and his wallet in his back right pocket. Those items were placed on the trunk lid. No weapons were found. (Tr. 21–24, 55–56, 59.)

At the back of the car, Detective Sneider conducted an identification inquiry as to Bailey, who was the driver of the car. Specifically, he asked Bailey who he was and Bailey stated his name. Sneider then asked where Bailey was coming from and he responded that he was coming from his house. When Sneider asked Bailey for the location of his house, Bailey stated that it was 103 Lake Drive.[2] Sneider then asked Bailey for identification and Bailey took his license out of his wallet and handed it to Sneider. Looking at the license, Sneider noticed that the address was not 103 Lake Drive in Wyandanch, but rather was a Bayshore address. The fact that the license

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[2] The other occupant of the car was also patted down and asked his name, as well as where he was coming from, by Detective Gorbecki. After providing his name, this individual stated that he was coming from the house of his friend, Chunon Bailey, and was on his way to his home at South 18th Street in Wyandanch. He also stated that he was on parole, had a 10:00 p.m. curfew, and Bailey was driving him home for that curfew. (Tr. 23–24.)

showed Bayshore as his town of residence was significant to Sneider because the confidential informant, who had provided information to the detectives in connection with the search warrant, had stated that the person from whom he had bought narcotics had lived in Bayshore prior to living at 103 Lake Drive. (Tr. 25, 56–57.)

After conducting the identification inquiry, Bailey and the other occupant of the vehicle were handcuffed for safety reasons to be transported back to 103 Lake Drive and detained during the execution of the search. After being handcuffed, Bailey asked why he was being arrested. In response to Bailey's inquiry, Detective Gorbecki advised him that he was not under arrest, but that he was being detained in connection with a search warrant that was about to be executed at his residence. Bailey then stated that he was not cooperating, he does not live there, and anything found there was not his. (Tr. 26–27, 45, 58–59.)

The detectives contacted a patrol car to transport Bailey and the other occupant back to the site of the search at 103 Lake Drive. The wallet was returned to Bailey's pants, but the keys (which contained five or six keys, including the key to the black Lexus) were used by Detective Gorbecki to transport the car back to the scene of the search. Uniformed officers drove Bailey and the other individual back to the scene of the search and, as the officers arrived back at the search, they were advised by the entry team that there was a gun and drugs in plain view in the apartment.[3] At that time, Bailey and the other individual were placed under arrest and the keys on the key ring were not returned, but were seized incident to the arrest. At some point on the evening of the

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[3] A total of less than ten minutes elapsed from the time Bailey was pulled over until he was returned to the search site. (Tr. 28.)

search of the apartment, a key on Bailey's key ring (along with the car key) was tested and fit the door of the searched apartment and, at that time, the key and lock were seized for evidence. (Tr. 27–29, 59–60.)

II. DISCUSSION

Bailey argues that his detention during the search of the residence was a violation of the Fourth Amendment and, thus, the evidence recovered as a result of that detention, including the key to the residence where contraband was recovered and his statements to the police, must be suppressed. More specifically, Bailey argues that: (1) the police did not have a lawful basis to stop him once he left the area of the residence that was about to be searched; (2) even if they had a lawful basis to stop him, his statements to the police without *Miranda* warnings violated the Fifth Amendment; and (3) the seizure of his keys during the stop violated the Fourth Amendment. As set forth below, the Court finds these arguments to be without merit and denies the motion. The Court will address the issues in turn—the car stop and detention, the statements, and the seizure of the keys.

A. Stop of Bailey's Car and Bailey's Subsequent Detention

Although Bailey argues that the stop of his vehicle violated the Fourth Amendment, the Court finds that the stop and his subsequent detention were lawful as a detention during the execution of a search warrant, under *Michigan v. Summers*, 452 U.S. 692, 705 (1981), or, in the alternative, as a lawful investigative detention, pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968).

1. Detention During Search of Residence Under *Summers*

It is well-settled that, regardless of individualized suspicion, "officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.'" *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (quoting *Michigan v. Summers*, 452 U.S. at 705). In *Summers*, the Supreme Court reasoned that "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home." 452 U.S. at 704. The Supreme Court has articulated three legitimate law enforcement interests that provide substantial justification for detaining an occupant during the search: (1) "'preventing flight in the event incriminating evidence is found'"; (2) "'minimizing the risk of harm to the officers'"; and (3) "facilitating 'the orderly completion of the search,' as detainees' 'self-interest may induce them to open locked doors or locked containers to avoid the use of force.'" *Muehler*, 544 U.S. at 98 (quoting *Summers*, 452 U.S. at 702–03); *see also Rivera v. United States*, 928 F.2d 592, 606 (2d Cir. 1991) ("Absent special circumstances, the police of course have the authority to detain occupants of premises while an authorized search is in progress, regardless of individualized suspicion.").

In the instant case, because Bailey was observed leaving the basement apartment at 103 Lake Drive that was about to be searched pursuant to a warrant, the police had the legal authority under *Summers* to detain Bailey for a reasonable period during the execution of the search. Bailey argues that *Summers* and its progeny are inapplicable to the instant case because Bailey was

not detained at the residence, but rather was followed a few blocks by police from the residence before he was detained. The Court disagrees. Both the Supreme Court and the Second Circuit have found that the authority to detain an occupant during a search applies even when the occupant is found and detained outside the residence. *Summers*, 452 U.S. at 702–06; *United States v. Fullwood*, 86 F.3d 27, 29–30 (2d Cir. 1996). More specifically, in *Summers*, policemen arriving at defendant's residence with a search warrant encountered the defendant while he was descending the front steps and detained him during the execution of the search of the residence. 452 U.S. at 693. In upholding that detention, the Court emphasized, "We do not view the fact that [the defendant] was leaving his house when the officers arrived to be of constitutional significance. The seizure of [the defendant] on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside." *Id.* at 702 n.16. Similarly, in *Fullwood*, as the officers arrived to execute a search warrant at a residence, the defendant was outside the residence entering his vehicle. 86 F.3d at 29. The Second Circuit held that "[i]t was permissible for the officers to require [the defendant] to reenter his home and to detain him while they conducted a search of the premises pursuant to a valid search warrant." *Id.* at 29–30.

Bailey argues that the key difference between the instant case and *Fullwood* is that, instead of detaining Bailey immediately outside the residence when they saw him enter his car (as in *Fullwood*), the police here followed Bailey a few blocks before detaining him and bringing him back to the search location. The Court does not view this factual distinction to have any constitutional significance under the facts of this case and concludes that the holding of *Fullwood* controls.

At least two of the law enforcement interests articulated in *Summers* applied here—namely, prevention of flight should incriminating evidence be found during the search and minimizing the risk of harm to the officers. *See Leveto v. Lapina*, 258 F.3d 156, 167 n.15 (3d Cir. 2001) ("A detention [under *Summers*] may be reasonable even if fewer than all of these law enforcement interests are present."). As both detectives testified at the hearing, they wanted to detain Bailey as he left the residence pending execution of the search, but did not do so immediately because of concerns about the effect that such a detention would have on officer safety, as well as the potential destruction of evidence. Instead, they followed him a short distance—approximately one mile or less than five minutes—and then detained him at the first spot where they determined it was safe to conduct the stop. The defendant's car never left their sight from the moment it drove from the residence until the car stop occurred a short distance away.

There is no basis for drawing a "bright line" test under *Summers* at the residence's curb and finding that the authority to detain under *Summers* always dissipates once the occupant of the residence drives away. If such a rule were adopted it would require police officers who want to detain an exiting occupant of a residence under *Summers*, to effectuate the detention in open view outside the residence that was about to be searched, thereby subjecting them to additional dangers during the execution of the search, and potentially frustrating the whole purpose of the search due to destruction of evidence in the residence. Specifically, such an action could jeopardize the search or endanger the lives of the officers about to conduct the search by allowing any other occupants inside the residence, who might see or hear the detention of the individual outside the residence as he was leaving, to have some time to (1) destroy or hide

incriminating evidence just before the police are about to enter for the search; (2) flee through a back door or window; or (3) arm themselves in preparation for a violent confrontation with the police when they entered to conduct the search. Neither the Constitution nor Supreme Court or Second Circuit precedent demands such a peculiar result.

Under the circumstances of this case, because the detectives certainly had the legal authority to immediately detain Bailey under *Summers* when he left the residence and entered a car, they possessed that same authority to detain him approximately five minutes later after following him a short distance away from the residence for safety reasons, and then to transport him back to the scene of the search. The Court credits the detectives' testimony and finds that the detention pursuant to *Summers* took place at the earliest practicable location that was consistent with the safety and security of the officers and the public.

In addition to the Second Circuit's holding in *Fullwood*, other circuit courts have reached similar conclusions on facts even more closely analogous to the facts of this case. For example, in *United States v. Cochran*, 939 F.2d 337, 338 (6th Cir. 1991), the police officers went to the defendant's residence to execute a search warrant and, prior to the search, defendant left his residence in his car, and was permitted to travel a short distance before the police stopped him. The Sixth Circuit found that the stop was lawful as a detention pursuant to the execution of the search warrant. Specifically, the Sixth Circuit refused to distinguish *Summers* notwithstanding the fact that the defendant was not stopped until after he left the residence in his vehicle:

> Defendant does not dispute the holding in *Summers*, but attempts to factually distinguish it from the instant case. In *Summers*, police stopped the individual as he was "descending the front steps." In contrast here, police stopped defendant after he had driven a short distance from his home. We do not find this distinction significant, however. *Summers* does not impose upon police a duty based on geographic proximity (*i.e.*, defendant must be detained while still on premises); rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence. Of course, the performance-based duty will normally, but not necessarily, result in detention of an individual in close proximity to his residence.

Id. at 339 (citations omitted); *see also United States v. Sears*, 139 Fed. Appx. 162, at *3 (11th Cir.) (detention under *Summers* was proper where individual left house about to be searched and police waited until individual drove about 100 feet from house in a vehicle before detaining him during execution of search) *cert denied*, 126 S. Ct. 504 (2005); *United States v. Cavazos*, 288 F.3d 706, 711 (5th Cir. 2002) (detention of occupant of residence, after he left residence about to be searched and drove two blocks in a car, was proper under *Summers*); *United States v. Harris*, No. Crim. 02-10240-GAO, 2004 WL 912809, at *1 (D. Mass. April 26, 2004) (defendant properly detained under *Summers* after he left his home and walked one or two dogs to adjacent yard about 30 yards from his house). The Court finds these cases to be persuasive and consistent with the logic of both *Summers* and *Fullwood*. As the Supreme Court has emphasized, "[a]n

officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'"[4] *Muehler*, 544 U.S. at 98 (quoting *Summers*, 452 U.S. at 705 n.19).

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[4] Some circuit courts, however, have declined to extend *Summers* to such detentions once the occupant of the residence has left the search scene. *See, e.g.*, *United States v. Edwards*, 103 F.3d 90, 93–94 (10th Cir. 1996) (refusing to apply *Summers* where defendant was stopped in his car, three blocks after leaving residence about to be searched, and detained for 45 minutes even though police had no reason to believe defendant, prior to the stop, was aware of imminent search of residence); *United States v. Sherrill*, 27 F.3d 344, 345–46 (8th Cir. 1994) (refusing to apply *Summers* to a defendant who had driven one block from residence about to be searched and police had "no interest in preventing flight or minimizing the search's risk because [the defendant] had left the area of the search and was unaware of the warrant"). The Court disagrees with the analysis in these cases and believes that they place too much emphasis on the issue of whether the individual leaving the area was aware that a search warrant was about to be executed. Neither *Summers* nor *Fullwood* stands for the proposition that the person leaving the search site must be aware that law enforcement is about to enter the premises in order to be lawfully detained pursuant to the warrant. Even if the individual leaving is unaware of the warrant or the imminent search, the Supreme Court recognized in *Summers* that there is a legitimate law enforcement interest in detaining the individual briefly so that, among other things, law enforcement will not have to try to re-locate that individual again if probable cause to arrest is established a short time later based on the results of the search. *Summers*, 452 U.S. at 705–06 ("Because it was lawful to require [the occupant] to re-enter and to remain in the house until evidence establishing probable cause to arrest him was found, his arrest and the search incident thereto were constitutionally permissible."). Therefore, without requiring knowledge or suspicion of the warrant by the exiting individual, *Summers* specifically stated that law enforcement has a legitimate reason to detain the person solely because they are leaving a residence that is about to be searched. *See Summers*, 452 U.S. at 703–04 ("The connection of an occupant to [the home subject to the search] gives the police officer an easily

Moreover, "[i]nherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." *Muehler*, 544 U.S. at 98–99. Thus, once an officer has authority to detain under *Summers*, it is beyond cavil that the officer also has the authority to conduct a pat-down of the individual and place the individual in handcuffs where legitimate safety concerns warrant such actions. *See Muehler*, 544 U.S. at 99–100 (officers acted reasonably by detaining occupant in handcuffs for two to three hours during execution of search where weapons were sought); *Fullwood*, 86 F.3d at 30 (during lawful detention pursuant to search of residence "[i]t was also prudent for the officers to handcuff [the resident] until they could be certain that the situation was safe"); *United States v. Barlin*, 686 F.2d 81, 87 (2d Cir. 1982) (search of handbag of woman who had entered an apartment being searched, along with individuals known to be involved in drug transactions in the apartment, constituted a lawful "minimal intrusion"); *see also Rivera v. United States*, 928 F.2d at 606 (police, when detaining occupant of premises during search, "have the authority to make a limited search of an individual on those premises as a self-protective measure"). Here, the Court concludes it was proper for the detectives to pat Bailey down outside the vehicle and place him in handcuffs while transporting him and detaining him during the execution of the search

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identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant."). As noted above, the holding and rationale of both *Summers* and *Fullwood* apply with equal force when, for officer safety reasons, police do not detain the occupant on the curbside, but rather wait for him to leave the immediate area and detain him as soon as practicable.

at the residence, particularly where the search of the residence was for a handgun.[5]

In short, the stop and detention of Bailey during the execution of the search was entirely proper under *Summers*. He was not detained as he left the search site for legitimate safety reasons, but instead was followed for approximately five minutes and then detained at the first location where the detectives determined they could safely detain him. There is absolutely no evidence that, in delaying the detention until he left the area, the detectives were manipulating the situation; rather, their conduct is completely consistent with concerns for officer safety. Moreover, in total, only approximately ten minutes elapsed from the time of the stop until the gun and drugs were found in the apartment and Bailey was placed under arrest. Under such circumstances, the stop and detention were lawful under *Summers*.[6]

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[5] Although Bailey relies on *Ybarra v. Illinois*, 444 U.S. 85 (1979) in support of his motion, that case is plainly distinguishable from the facts here. In *Ybarra*, the Court found that a pat-down of every person in a public bar pursuant to a search warrant for the bar was improper without any showing of a special connection to the premises or any reason to believe a person was armed. The *Ybarra* holding simply does not apply to a situation, as in the instant case, where the search warrant relates to a private residence where both the Supreme Court and Second Circuit have found detention and pat-down of the occupants, regardless of individualized suspicion, to be appropriate. *See Jaramillo*, 25 F.3d at 1152–53 (distinguishing *Ybarra* "which involved the search of an unsuspicious person in a public tavern, rather than the . . . *Michigan v. Summers* and *United States v. Barlin* line of cases, which involved detentions or pat downs in connection with permissible searches of private homes") (citations omitted).

[6] At the suppression hearing, Bailey's counsel also argued that, because the officers did not physically see Bailey leave the basement apartment door at the bottom of a staircase on the side of the house, but rather observed Bailey emerge from the gated area containing a

2. Investigative Detention Pursuant to *Terry*

Even if there was no authority for the detention under *Summers*, the Court finds that the stop of the defendant's car and brief detention during the search were supported by reasonable suspicion and were lawful under *Terry*. As set forth below, the detectives had a sufficient factual basis—including the fact that Bailey exited the search location and matched the general description provided by the confidential informant—to stop the vehicle. Moreover, that initial information, which was bolstered by Bailey's statement during the stop that 103 Lake Drive was his residence, the other occupant's statement confirming that, and the information on his driver's license, provided more than a sufficient factual basis under *Terry* to transport Bailey a short distance back to his residence and briefly detain him during the search.

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staircase leading to the door to the basement apartment, the detectives could not say they saw Bailey leave the apartment door and, thus, *Summers* does not apply. The Court finds this argument to be without merit because this factual distinction is of no consequence given the layout of the residence at 103 Lake Drive. More specifically, the Government unequivocally established at the hearing, through photographs and testimony, that the staircase leading to the basement apartment was fully enclosed by a small gated area at the top of the steps (measuring about four feet by six feet) such that, once inside the gate, the only place one could access was the basement apartment. In other words, the gated area was completely separate from the backyard and there was nothing in that small gated area other than a staircase leading to the basement apartment. (Tr. 5–13; Exs. 3–11.) Thus, when the detectives observed Bailey emerge from the gated area, the only place that he could have come from was the basement apartment. Under such circumstances, there was a sufficient factual basis to trigger a lawful detention of Bailey under *Summers* during the execution of the search.

It is well-settled that, in determining whether an investigative stop is reasonable under the Fourth Amendment, the court must analyze "'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Alexander*, 907 F.2d 269, 272 (2d Cir. 1990) (quoting *Terry*, 392 U.S. at 20). Under the first prong of this analysis, "an investigative stop does not comport with the requirements of the Fourth Amendment unless 'specific articulable facts, together with rational inferences from those facts, [ ] reasonably warrant suspicion' that the individual stopped was engaged in criminal activity." *Alexander*, 907 F.2d at 272 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)); *accord United States v. Colon*, 250 F.3d 130, 134 (2d Cir. 2001); *United States v. Jaramillo*, 25 F.3d 1146, 1150 (2d Cir. 1994). In determining whether a *Terry* stop was supported by reasonable suspicion, a court must consider the totality of the circumstances "'through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.'" *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000) (quoting *United States v. Oates*, 560 F.2d 45, 61 (2d Cir. 1977)). Moreover, "[i]n connection with such a stop, the officer may 'tak[e] steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.'" *Jaramillo*, 25 F.3d at 1150–51 (quoting *Terry v. Ohio*, 392 U.S. at 23); *see also Colon*, 250 F.3d at 134 ("The investigating officer may also frisk an individual for weapons if the officer reasonably believes that person to be armed and dangerous."); *Alexander*, 907 F.2d at 273 (in traffic stop of suspected narcotics traffickers, officers were reasonable in deciding to unholster their guns and frisk the occupant of the car).

Here, based on the fact that Bailey left the basement apartment which was about to be searched and (along with the other occupant of the car) matched the general description (*i.e.*, build, hair type, and race) of the individual whom the confidential informant had identified as the drug trafficker, the detectives had specific and articulable facts that supported the investigative stop and brief detention during the execution of the search at the residence.[7] *See, e.g., United States v. Henderson*, 645 F.2d 627, 628–29 (8th Cir. 1981) (stop of defendant two or three miles after he left residence about to be searched

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[7] Moreover, although there was sufficient basis for the detention during the execution of the search at the residence under *Terry* even prior to the stop, the detectives learned more during the stop that provided additional basis for the temporary detention during the execution of the search. In particular, after stopping Bailey, the detectives learned from Bailey (and the other occupant) that 103 Lake Drive was Bailey's residence and Detective Sneider saw that Bailey's driver's license indicated an address in Bayshore (not Wyandanch), which is the town in which the informant said that the trafficker he dealt with had resided at some earlier point in time. Thus, this questioning during the stop provided additional specific and articulable facts that supported a brief detention (including transport back to the search site) under *Terry* during the execution of the search. Whether the detectives had already decided to detain the occupants of the car under *Summers* even prior to the questioning regardless of Bailey's answers is irrelevant to this determination because it is well-settled that the officer's subjective intent is not relevant on such an issue. *See Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Bayless*, 201 F.3d at 133 (2d Cir. 2000) ("Reasonable suspicion is an objective standard; hence, the subjective intentions or motives of the officer making the stop are irrelevant."); *see also United States v. Vargas*, 369 F.3d 98, 101 (2d Cir. 2004) ("the officers' subjective intent does not calculate into the analysis" in determing if an investigatory stop ripened into an arrest).

was lawful under *Terry*); *United States v. Willis*, No. 05-CR-6123L, 2006 WL 2239738, at *5 (W.D.N.Y. Aug. 4, 2006) (lawful under *Terry* to detain individual about to enter house being searched, to escort him a short distance from his parked car into the house, and to handcuff him during the search)

Although Bailey argues that the informant's general description and Bailey's exiting the basement apartment area were insufficient justification for the stop, the Second Circuit has specifically held otherwise. In *Jaramillo*, the Second Circuit stated that "[c]ircumstances giving rise to sufficiently 'specific and articulable facts' to warrant the stop and patdown of an individual" includes "an individual's ownership or occupancy of private premises for which a search warrant has been obtained." *Jaramillo*, 25 F.3d at 1151 (citing *Summers*). Similarly, in *United States v. Salazar*, 945 F.2d 47 (2d Cir. 1991), the Second Circuit upheld the pat-down search of an individual who, among other things, matched the informant's general description of the narcotics dealer and the individual entered the premises from which the informant said that drugs were being distributed. *Id.* at 50–51.

In addition, given that the detectives were searching for a gun at the residence and Bailey came from that residence, they were justified under *Terry* in patting down Bailey during the stop and handcuffing him while he was being transported back to the residence and briefly detained during the execution of the search.[8] This conduct

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[8] The cases which allow such restraints under *Summers* apply with equal force even when conducting the analysis under *Terry*. In other words, even assuming the detectives needed reasonable suspicion under *Terry* to stop Bailey in his car and detain him during the search, the same restraints that have been allowed under *Summers* would also be permitted under *Terry* once there are sufficient spe-

by the detectives did not transform the situation into a *de facto* arrest. As the Second Circuit has emphasized, "where an officer has a reasonable basis to think that the person stopped poses a present physical threat to the officer or others, the Fourth Amendment permits the officer to take 'necessary measures . . . to neutralize the threat' without converting a reasonable stop into a *de facto* arrest." *United States v. Newton*, 369 F.3d 659, 674 (2d Cir.) (quoting *Terry v. Ohio*, 392 U.S. at 24) *cert denied*, 543 U.S. 947 (2004). The Second Circuit further explained that "[t]his doctrine has supported a range of restraints incident to a stop, from the pat-down at issue in *Terry*, . . . to the drawing of firearms, . . . to the use of handcuffs." *Id.* (citations omitted). Specifically, in *Newton*, the Court found that it was reasonable under the Fourth Amendment for six officers to go to an apartment being searched and handcuff the occupant during the search of the apartment for a firearm. *Id.* at 675. As in *Newton*, the pat-down and handcuffing of Bailey during his transport back to the residence during the execution of the search was reasonable under the circumstances and did not violate the Fourth Amendment.

Moreover, under the particular circumstances of this case, the fact that Bailey was escorted a short distance back to his home in a patrol car pending the outcome of the search does not convert this investigative detention into an arrest that requires probable cause. *See United States v. Gori*, 230 F.3d 44, 56 (2d Cir. 2000) ("[i]t is well established that officers may ask (or force) a suspect to move as part of a lawful *Terry* stop"); *United States v. Charley*, 396 F.3d 1074, 1080 (9th Cir. 2005) ("police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of

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cific and articulable facts present to justify the *Terry* investigative detention.

achieving the legitimate goals of the detention given the specific circumstances of the case") (internal quotations and citations omitted); *see also Gallegos v. City of Los Angeles*, 308 F.3d 987, 990–93 (9th Cir. 2002) (valid investigative stop where police officers pulled over a man they mistakenly believed to be a burglary suspect, ordered him out of his vehicle at gunpoint, handcuffed him, placed him in the back of their patrol car, and brought him back to the scene of the incident for identification); *Halvorsen v. Baird*, 146 F.3d 680, 684–85 (9th Cir. 1998) (evidence supported finding that *Terry* stop did not become an arrest where officers handcuffed suspect and drove him to a nearby gas station for questioning); *United States v. Vega*, 72 F.3d 507, 515 (7th Cir. 1995) (holding that defendant's stop was "not tantamount to an arrest" even though "the officers drew their weapons, asked [the defendant] to accompany them [back to the crime scene] in one of their cars," and kept him in the officer's vehicle for over an hour); *United States v. Blackman*, 66 F.3d 1572, 1576–77 (11th Cir. 1995) (no arrest where FBI agents surrounded apartment, ordered suspects to come with their hands up, and handcuffed them).

As the Supreme Court has recognized, "there are undoubtedly reasons of safety and security that could justify moving a suspect from one location to another during an investigatory detention." *Florida v. Royer*, 460 U.S. 491, 504–05 (1983); *see also Halvorsen*, 146 F.3d at 685 ("[m]oving a suspect from one location to another does not automatically turn a detention into an arrest, where reasons for safety and security justify moving the person"); 4 Wayne R. LaFave, *Search and Seizure*, § 9.2(g) at 348 (4th ed. 2004) ("it seems clear that some movement of the suspect in the general vicinity of the stop is permissible without converting what would otherwise be a temporary seizure into an arrest"). Here, for

both security and safety reasons, it was reasonable for the detectives to transport Bailey a short distance back to the search site, rather than remain in front of the firehouse during the execution of the search.

Accordingly, even assuming the detention was not authorized under *Summers*, the Court concludes that these facts were sufficient under *Terry* to provide a specific and articulable suspicion justifying Bailey's stop and brief detention for approximately ten minutes during the search of the residence and Bailey's seizure did not equate to a *de facto* arrest under the Fourth Amendment.

B. Bailey's Statements During Detention

Bailey argues that, even if the stop was lawful, statements that he made during the stop must be suppressed because they were obtained without providing him with *Miranda* warnings. Although the Government argues that, because the detectives were authorized under *Summers* to detain him, they were also authorized to ask Bailey questions regarding his identity and address. However, the Second Circuit has made clear that the issue about whether an investigatory stop is reasonable under the Fourth Amendment is separate from whether the seized suspect is "in custody" for purposes of *Miranda*. More specifically, in *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995), the Second Circuit stated that "whether [a] 'stop' was permissible under *Terry v. Ohio* . . . is irrelevant to the *Miranda* analysis. *Terry* is an 'exception' to the Fourth Amendment probable cause requirement, not to the Fifth Amendment protections against self-incrimination." *Id.* at 1473. Moreover, the Second Circuit has applied this same analysis in considering statements made while an individual is detained during the execution of a search pursuant to *Summers*.

See Newton, 369 F.3d at 673 (in examining *Miranda* issues, "instead of asking whether the degree of restraint was reasonable, we have focused on 'whether a reasonable person in defendant's position would have understood himself to be subjected to the restraints comparable to those associated with a formal arrest.'") (quoting *Ali*, 68 F.3d at 1472).

Thus, in the instant case, the lawfulness of Bailey's initial stop and detention during the search does not end the inquiry. The Court must also analyze whether the statements made by Bailey during the stop without *Miranda* warnings were proper. There are two sets of statements at issue: (1) Bailey identifying himself and stating he had come from his house at 103 Lake Drive (which was the site of the search); and (2) after asking why he was being arrested and being told that he was not under arrest but that a search was taking place at 103 Lake Drive, Bailey stated that he was not cooperating, he did not reside at that address, and that anything found there was not his. In particular, as set forth below, the threshold question is whether Bailey was "in custody" for purposes of *Miranda* at the time any of these statements were made.

It is well-settled that *Miranda* warnings only apply to "custodial interrogation." *Miranda*, 384 U.S. at 444; *accord Thompson v. Keohane*, 516 U.S. 99, 102 (1995); *Parsad v. Greiner*, 337 F.3d 175, 181 (2d Cir. 2003). In *Newton*, which (as noted earlier) dealt with statements by a handcuffed parolee while his residence was being searched, the Second Circuit clarified the test for determining whether a person is in custody for purposes of *Miranda*. 369 F.3d at 669–70. Two tests had been discussed in prior Second Circuit cases. *See United States v. Morales*, 834 F.2d 35, 38 (2d Cir. 1987) (utilizing the "coercive pressures" test for custody in which *Miranda*'s

"in custody" requirement is met if questioning was "conducted in custodial settings that have inherently coercive pressures that tend to undermine the individual's will to resist and to compel him to speak"); *Tankleff v. Senkowski*, 135 F.3d 235, 242 (2d Cir. 1998) (utilizing the "free to leave" test in which "[t]he test used in determining whether a defendant was in custody is an objective one that (a) asks whether a reasonable person would have understood herself to be subjected to restraints comparable to those associated with a formal arrest, and (b) focuses upon the presence or absence of affirmative indications that the defendant was not free to leave"). In *Newton*, the Second Circuit explained how these two prior cases were not "at odds" with each other:

> We take this opportunity to clarify how the free-to-leave test referenced in *Tankleff* and the coercive-pressures test articulated in *Morales* both serve to identify circumstances requiring *Miranda* warnings. The free-to-leave inquiry constitutes a necessary, but not determinative, first step in establishing *Miranda* custody. The "ultimate inquiry" for determining *Miranda* custody, however, is that articulated by the Supreme Court in *California v. Beheler*: "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." [internal quotations and citations omitted]. . . . In such cases—i.e., where a person formerly at liberty is subjected to formal arrest or arrest-like restraints—specific coercive pressures need not be proved to establish *Miranda* custody; rather, coercive pressures are presumed from the fact of such custody.

369 F.3d at 670 (quotations and citations omitted). The Court emphasized that "although coercive pressure is *Miranda*'s underlying concern, custody remains the touchstone for application of its warning requirement." *Id.* at 671. Thus, "[t]he test for custody is an objective one: 'whether a reasonable person in defendant's position would have understood himself to be subjected to the restraints comparable to those associated with a formal arrest.'" *Id.* (quoting *Ali*, 68 F.3d at 1472 (internal quotation marks omitted)).

(1) Bailey's Initial Statement Regarding His Name and 103 Lake Drive

The Court will first examine the statement Bailey made, prior to being handcuffed, regarding his name and the location he had just left.[9] As to the initial inquiry un-

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[9] As to names and addresses, the Court recognizes that, independent of the "custody" issue, routine questions "reasonably related to the police's administrative concerns" do not constitute interrogation for *Miranda* purposes and, thus, do not require *Miranda* warnings. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *see also Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177, 191 (2004) ("Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances."); *United States v. Lockett*, 393 F.3d 834, 837 (8th Cir. 2005) ("[i]nterrogation does not generally include routine processing-type questions such as the name and address of a suspect") (quotations and citations omitted); *United States v. Edwards*, 885 F.2d 377, 385 (7th Cir. 1989) ("police routinely ask people for their names and addresses in nonarrest situations—in order to ascertain the identity and residence of witnesses, as well as to dispel (or confirm) suspicions aroused by unusual behavior—where it is clear that *Miranda* warnings are not required, although such inquires might in fact confirm a police officer's suspicions sufficiently to give rise to probable cause to arrest"). Moreover, the D.C. Circuit has found that questioning an occupant of a house during a search about his address and ownership of the residence does not implicate *Miranda* because it satisfies the administrative concern about serv-

der the "in custody" test, the Court finds that, when Bailey was pulled over by the police and asked to exit his vehicle, a reasonable person in his position would believe under such circumstances that they were not free to leave at that point. However, that does not end the "in custody" test for *Miranda* purposes. *See Cruz v. Miller*, 255 F.3d 77, 84 (2d Cir. 2001) (noting that the Supreme Court has "acknowledged that the motorist did not feel

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ing a copy of the warrant on the owner of a house. *See United States v. Gaston*, 357 F.3d 77, 82 (D.C. Cir. 2004).

However, in the instant case, the Court finds that the detectives' questioning of Bailey went beyond any administrative concerns and, the detectives' questions, including asking where Bailey had just left from, would implicate *Miranda* if Bailey is found to be "in custody" for *Miranda* purposes. *See Hiibel*, 542 U.S. at 191 ("a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict that individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow.") The question was not a request for an address for booking purposes or some other routine traffic stop reason; rather, where the detective had just seen Bailey leave the search location, he knew that Bailey's response to that question was likely to be incriminating. Similarly, the rationale in *Gaston* does not apply here because the detectives already knew where Bailey had come from before asking the question, and never even inquired about his actual address. Moreover, when he stated he lived at 103 Lake Drive, they asked no follow-up questions regarding his exact relationship with 103 Lake Drive—such as whether he lived in the main house or the basement apartment—as would be needed to serve a copy of the warrant on the resident. Under these circumstances, there is no basis for believing that the questioning could reasonably be related to serving a copy of the warrant on the owner of the premises and the Government did not even advance that argument at the suppression hearing. Thus, under such circumstances, the Court must analyze whether Bailey was "in custody" for *Miranda* purposes at the time he made the statement regarding his identity and that he had just come from 103 Lake Drive, which was his home.

free to leave, yet could be questioned without *Miranda* warnings") (citation omitted). The Court must consider whether a reasonable person would have understood himself to be subjected to restraints comparable to those associated with a formal arrest.

After carefully considering all of the facts, the Court finds that a reasonable person in Bailey's situation, at the time he made the statement about 103 Lake Drive being his house, would not have had the belief that he or she was being subjected to the restraints associated with formal arrest. More specifically, at the time he made the statement, Bailey was not handcuffed and no guns were drawn. Moreover, he was not even told at that juncture that he was going to be detained during the pendency of the search. The fact that he was asked to exit the vehicle and patted down does not transform what would appear to a reasonable person in defendant's situation to be a routine investigative stop into a custodial situation for *Miranda* purposes. *See Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (the nonthreatening character of *Terry* stops "explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*"); *see also Pennsylvania v. Bruder*, 488 U.S. 9, 11 (1988). In fact, courts have found *Miranda* not to be implicated in situations involving far more intrusive actions by police during investigative stops, for safety reasons. *See Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) ("Several courts have ruled that an initial display of guns, subsequently reholstered, does not result in 'custody' that requires *Miranda* warnings.") (collecting cases); *see also United States v. Leshuk*, 65 F.3d 1105, 1109–10 (4th Cir. 1995) ("drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes"). Under the factual circumstances in this case, no

reasonable person in Bailey's situation would believe that he or she was being subject to restraints equivalent to a formal arrest.[10]

At oral argument, Bailey argued that a belief he was under arrest was reasonable because he was not being stopped due to a traffic violation or some other violation of the law. The Court finds that argument to be without merit. The mere fact that an individual is pulled over even though such person did not commit a traffic infraction does not mean he or she would be reasonable to assume that he or she was under arrest or subject to restraints similar to arrest. Indeed, the Supreme Court has analogized *Terry* stops with traffic stops for purposes of conducting the "in custody" analysis under *Miranda*. *See Berkemer*, 468 U.S. at 440 n.29 ("most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized under *Terry*"). Therefore, the lack of a traffic infraction did not transform this stop, at the time of questioning, into a *Miranda* event.

In sum, the Court concludes that this stop under *Summers* pursuant to a lawful search of the residence (or as an investigatory stop under *Terry*), did not rise to the level of *Miranda* custody at the time of Bailey's statement about his name and the location from which he had come from and, thus, the motion to suppress those statements is denied.

(2) Bailey's Statement After Being Handcuffed

The Court will now turn to Bailey's statement after being handcuffed. The Court finds that, once the officer placed the handcuffs on Bailey, he was "in custody" for

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[10] These facts distinguish the situation from the parolee in *Newton* who, prior to questioning, was detained and handcuffed pursuant to a search of his mother's apartment.

Miranda purposes, even though he was not under formal arrest. As the Second Circuit has noted, "[h]andcuffs are generally recognized as a hallmark of a formal arrest." *Newton*, 369 F.3d at 676; *see also N.Y. v. Quarles*, 467 U.S. 649, 655 (1984) (holding that handcuffed defendant was in custody for purposes of *Miranda*); *Dunaway v. N.Y.*, 442 U.S. 200, 215 & n.17 (1979) (listing handcuffs as a "trapping[] of a technical formal arrest"). In the instant case, upon being handcuffed, a person in Bailey's situation would reasonably conclude "that his detention would not necessarily be temporary or brief and that his movements were now totally under the control of the police—in other words, that he was restrained to a degree normally associated with formal arrest and, therefore, in custody." *Newton*, 369 F.3d at 676.

The Court recognizes that, although handcuffing Bailey, the detectives specifically advised Bailey that he was not being placed under arrest. However, under the circumstances of this case, that caution by the officers does not change the analysis. In fact, this is precisely what occurred in *Newton* where the Second Circuit found that, even when the individual being detained during the search warrant execution was told that he was not under arrest and was being handcuffed only for his own safety and the safety of the officers, the person was "in custody" for *Miranda* purposes:

> Having considered all the circumstances presented here, we conclude that a reasonable person would have understood that his interrogation was being conducted pursuant to arrest-like restraints. Although a reasonable person told, as Newton was, that he was not under arrest would likely have understood that he was not about to be removed from his home to the police station—

> a significant factor in assessing the degree to which one is at the mercy of authorities, . . .—a reasonable person would also have understood that as long as the handcuffs remained in place, his freedom of movement, even within his home, would be restricted to a degree comparable to that of an individual placed under formal arrest. The record does not indicate whether Newton was told that the specific reason for a safety concern in his case was that the officers were searching for a gun. Thus, we cannot assume that a reasonable person in his situation would have understood that the handcuffing would likely last only until the officers had completed their search. Neither can we assume an understanding that removal or maintenance of the handcuffs depended on the outcome of the search rather than on the suspect's responding to questions posed.

Newton, 369 F.3d at 677 (quotations and citations omitted). As in *Newton*, Bailey had no basis for knowing why the handcuffs were necessary or how long he would remain detained and handcuffed. A belief that his freedom of movement was being restricted to a degree comparable to formal arrest was further enhanced in the instant case because the handcuffing did not occur in Bailey's home, but rather took place on the street next to his vehicle after a car stop while he was being transported *back* to his home. Thus, this Court concludes that handcuffing Bailey, "though reasonable to the officers' investigatory purpose under the Fourth Amendment, nevertheless placed him in custody for purposes of *Miranda*." *Id.* The Court, however, does not conclude that Bailey's statements following the handcuffing must be sup-

pressed because, as set forth below, his statements were not in response to interrogation, which is a separate requirement for *Miranda* to be implicated.

It is well-settled that "interrogation" for *Miranda* purposes consists not only of "express questioning" but also its "functional equivalent" including "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from a subject." *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980); *accord United States v. Colon*, 835 F.2d 27, 30 (2d Cir. 1987). In the instant case, Bailey's statements subsequent to being handcuffed—that he was not cooperating, that he does not live at 103 Lake Drive, and that anything found there was not his—were made spontaneously, and not in response to conduct by the detectives that amounted to interrogation or its functional equivalent. In fact, the statements occurred only when Bailey asked why he was being arrested and was told that he was not being arrested, but was being detained because 103 Lake Drive was being searched. It was only after Bailey was supplied with that information, in direct response to his own question, that he spontaneously made the statements at issue. *Colon*, 835 F.2d at 30 (statement admissible where "[defendant] was not questioned, confronted with evidence, or even encouraged to be honest and tell the facts. [The defendant] initiated the conversation. . . .").

Under such circumstances, in simply answering Bailey's question about why he was being arrested, the detectives did nothing that was reasonably likely to elicit an incriminating response and the exchange was one normally attendant to custody—namely, explaining the basis for the custody. *See, e.g., United States v. Henderson*, 770 F.2d 724, 728 (8th Cir. 1985) ("When [defendant]

initiated conversation by requesting that [the law enforcement officer] specify the charges, the ensuing verbal exchange was nothing more than a conversation 'normally attendant to arrest and custody'" and, thus, was not interrogation under *Miranda*) (quoting *Innis*, 446 U.S. at 300–01); *see also United States v. Fleck*, 413 F.3d 883, 892–93 (8th Cir. 2005) (police request for key to bedroom during search did not constitute interrogation for *Miranda* purposes); *United States v. Lockett*, 393 F.3d 834, 838 (8th Cir. 2005) (statements made after defendant asked why the police were in his apartment, and was told the reason, were not in response to interrogation); *United States v. Henry*, 940 F. Supp. 342, 346 (D.D.C. 1996) (officer's response to inquiry by defendant about what he was being charged with was not "interrogation" for purposes of *Miranda*). Thus, those spontaneous statements are admissible even in the absence of *Miranda* warnings.[11]

C. Seizure of the Keys

The Court next examines whether the seizure of the keys during the car stop was proper. Detective Sneider testified that he removed Bailey's keys, including the key to his car and the residence, from Bailey's front left pocket during the pat-down search at the back of the car. (Tr. 56.) After the decision was made to transport Bailey and the other occupant of the car back to 103 Lake Drive in a patrol car, Detective Gorbecki took those keys to use them to transport Bailey's car to the search location. (Tr. 59.) Upon arriving back at the residence, the detectives

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[11] The Court does not find any voluntariness issue as to Bailey's statements. There is no indication that his statements were anything other than the product of a "rational intellect and free will." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). All the statements were made freely and without coercion.

learned of the discovery of the gun during the search, and placed Bailey under arrest. (Tr. 61.) Shortly thereafter, Detective Sneider tested one of the keys on the key ring in the door to the basement apartment at 103 Lake Drive and determined that it matched the lock. (Tr. 60.)

Bailey now argues that the seizure of the keys during the car stop violated the Fourth Amendment. The Government argues that the keys were properly removed during the pat-down search and that the subsequent seizure of the keys to transport Bailey's car was proper under the police's community care function. For the reasons set forth below, the Court finds that the seizure of the keys was lawful.

As a threshold matter, the Court concludes that the removal of the keys during the pat-down was proper.[12] As noted *supra*, the use of the pat-down during the stop was lawful to ensure officer safety and, after feeling a hard object in the pocket, the removal of the keys from the pocket was permissible to ascertain if there was a weapon in the pocket.[13] *See, e.g., United States v. Strahan*, 984 F.2d 155, 158 (6th Cir. 1993) (proper to reach

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[12] Bailey's counsel argued at the suppression hearing that the Court should not credit Detective Sneider's testimony that the car key was found in Bailey's pocket among other keys on a key ring. Rather, counsel argued that the Court should conclude that the car key was a single key in the ignition. Counsel, in support of that argument, points to alleged inconsistencies in Detective Sneider's testimony and the vouchers for the keys. (Tr. 93–94.) The Court rejects this argument in its entirety and credits Detective Sneider's testimony that he found the keys (including the car key and the key to the residence) on a key ring in Bailey's pocket during the pat-down.

[13] Even if the keys were not properly removed as part of the pat-down search, the Court finds that Bailey's motion still fails because, as discussed below, the seizure of the keys was justified under the Fourth Amendment to transport his car back to the search location.

into pocket and remove money clip during pat-down to determine if it was some type of weapon). The Court next turns to whether the subsequent seizure of the keys following the pat down to transport Bailey's vehicle was lawful.

The Supreme Court has repeatedly held that police may impound vehicles "[i]n the interests of public safety and as part of what the [Supreme] Court has called 'community caretaking functions.'" *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976) (quoting *Cady v. Dombrowski*, 413 U.S. 433 (1973)). More specifically, "[p]olice officers may exercise their discretion in deciding whether to impound a vehicle, so long as that discretion is 'exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.'" *United States v. Best*, 415 F. Supp. 2d 50, 53 (D. Conn. 2006) (quoting *Colorado v. Bertine*, 479 U.S. 367, 375 (1987)).

It is well-established that, when a person is taken into custody after being stopped in his vehicle, it is reasonable for police officers to impound the vehicle under the community car functions where, among other things, the vehicle would otherwise potentially impede traffic, threaten public safety, or be subject to vandalism. *See United States v. Jensen*, 425 F.3d 698, 706 (9th Cir. 2005) ("Once the arrest was made, the [community caretaker] doctrine allowed law enforcement officers to seize and remove any vehicle which may impede traffic, threaten public safety, or be subject to vandalism.") *cert denied*, 126 S. Ct. 1664 (2006); *Hallstrom v. Garden City*, 991 F.2d 1473, 1477 n.4 (9th Cir. 1993) (impoundment of arrestee's car from private parking lot "to protect the car from vandalism or theft" was reasonable under the community caretaking function); *United States v. Rodriguez-Morales*, 929 F.2d 780, 785 (1st Cir. 1991) ("the po-

lice had a legitimate reason for stopping the car and a strong noninvestigatory justification for removing it from the highway") (collecting cases); *United States v. Johnson*, 734 F.2d 503, 504-05 (10th Cir. 1984) (reasonable to tow and impound vehicle lawfully parked in commercial parking lot following arrest of driver).

Although Bailey was not being placed under arrest, the "community care" function applies with equal force to the instant situation where his car was transported one mile back to the site of the search, where Bailey was going to be temporarily detained. Here, the detectives were confronted with a situation where they had stopped the vehicle in the Fire Department parking lot and were going to transport Bailey and the other occupant of the vehicle back to 103 Lake Drive during the execution of the search. Rather than leave the car in the Fire Department parking lot, the detectives decided to bring Bailey's car back to the residence at 103 Lake Drive for safekeeping. (Tr. 59.) As a result, Detective Gorbecki used Bailey's keys to drive the car back to 103 Lake Drive while a uniformed patrol car transported Bailey and the other occupant back to the residence. (Tr. 28, 81.) Detective Gorbecki testified that, in addition to taking the car back for safekeeping, they also did not want to leave the car in that parking lot where it was blocking the bay doors to the firehouse. (Tr. 41.) The Court also notes that, although Bailey was only being temporarily detained during the execution of the search, the detectives knew that such detention might potentially be transformed into an arrest, and more lengthy detention, depending on what was found during the search. Such variables further support the reasonableness of the detectives' decision. Moreover, in addition to having a solid, noninvestigatory rationale for the seizure of the keys and transport of the vehicle, the Court also concludes that there is absolutely no suggestion that the detectives'

conduct was pretext for some investigatory purpose. In fact, the car was not searched in connection with the transport of the vehicle or at any time prior to Bailey's arrest after returning to the search location. (Tr. 62–63.) Similarly, Detective Sneider did not seize Bailey's wallet after the pat-down search, but rather returned it to his pocket. (Tr. 59.)

To the extent that Bailey suggested, during questioning of the detectives at the hearing, that the car did not need to be moved at all because it was in a well-lit, safe firehouse parking lot, the Court rejects that argument. As noted above, in addition to safekeeping the car, the detectives also were concerned about not creating a public hazard by allowing the car to remain in the firehouse parking lot where it was blocking the firehouse doors. There is no indication whether there was another safe area in the immediate vicinity of the firehouse to which the car could be moved. However, even if there was another safe area, the decision to alleviate this problem by transporting the car back to the residence, which was only one mile away and was the same location to which Bailey was being transported, was certainly reasonable under the circumstances. As the First Circuit has recognized:

> [T]he existence of alternative means of dealing with the automobile, even less intrusive means, does not illegitimate the constables' decision to impound it. When a motor vehicle is left without a licensed driver in the course of a lawful highway stop, the Constitution only requires the police to act reasonably with regard to disposition of the vehicle. There is no requirement that the officers must select the least intrusive way of ful-

> filling their community caretaking responsibilities.

Rodriguez-Morales, 929 F.2d at 786.

In sum, the detectives' decision to transport the car back to 103 Lake Drive was reasonable under their community caretaking functions and, thus, the seizure of Bailey's keys to effectuate the transport was proper. Of course, once Bailey was transported back to the residence and then placed under arrest when the firearm was found in the residence, the keys (including the key to the residence) could be kept incident to Bailey's arrest. *See United States v. Perea*, 986 F.2d 633, 643 (2d Cir. 1993) (where an individual is arrested in a location other than his home, "the arresting officers may impound the personal effects that are with him at the time to ensure the safety of those effects or to remove nuisances from the area") (quotations and citations omitted). Accordingly, the motion to suppress the keys is denied.[14]

III. CONCLUSION

For the foregoing reasons, defendant's motion to suppress is DENIED.

SO ORDERED.

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[14] Even if the car was improperly transported and the keys improperly seized, suppression would still not be warranted under the inevitable discovery doctrine. More specifically, if the detectives had detained Bailey at the side of the road during the search of the residence and not searched him or transported him, he would have been placed under arrest after the results of the search were complete and the key to the residence would have inevitably been discovered and been properly seized incident to that arrest. *See Perea*, 986 F.2d at 644 (suppression would be unwarranted where evidence "would inevitably have been discovered as part of a valid inventory search . . . subsequent to [a] lawful arrest").

OPPOSITION BRIEF

No. 11-770

In the Supreme Court of the United States

CHUNON L. BAILEY, AKA POLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981), the detention of an individual who has just left the premises to be searched under warrant is permissible when the individual is detained out of view of the house as soon as practicable.

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In the Supreme Court of the United States

No. 11-770

CHUNON L. BAILEY, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 652 F.3d 197. The order of the district court (Pet. App. 22a-57a) is reported at 468 F. Supp. 2d 373.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on September 20, 2011 (Pet. App. 21a). The petition for a writ of certiorari was filed on December 16, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possessing at least five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-20a.

1. On July 28, 2005, a confidential informant advised Officer Richard Sneider of the Suffolk County, New York, Police Department that he had purchased six grams of crack cocaine that weekend at 103 Lake Drive, Wyandanch, New York, from an individual named "Polo" (who turned out to be petitioner) and that he had seen a .380 semi-automatic handgun on the kitchen table at the apartment. The informant stated that he had made purchases from "Polo" six or seven times before, sometimes in Bay Shore, New York, where "Polo" used to live. At 8:45 p.m. that evening, based on the information provided by the informant, Officer Sneider obtained a warrant to search the basement apartment at 103 Lake Drive for a .380 handgun.[1] The warrant provided that the apartment was "believed to be occupied by an individual known as 'Polo,' a heavy set black male with short

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[1] Officer Sneider testified (C.A. App. A207) that he sought a warrant to search only for the firearm because the informant had not seen a quantity of drugs at the Lake Drive residence during the weekend sale when he saw the firearm.

hair. Pet. App. 3a; Gov't C.A. Br. 4-5; C.A. App. A197-A198, A207.

At 9:56 p.m. that evening, while conducting pre-search surveillance, Officers Sneider and Richard Gorbecki observed two men—later identified as petitioner and Bryant Middleton—exiting the gate at the top of the stairs that led down to the basement of 103 Lake Drive and getting into a black Lexus parked in the driveway. Both petitioner and Middleton matched the informant's description of "Polo." The officers determined that for safety reasons they would not confront the two men in the driveway; in particular, they wished to avoid alerting anyone else who might have been in the apartment to the presence of law enforcement. The officers therefore watched as petitioner's car pulled out of the driveway and proceeded down the block. The officers did not stop the car in the immediate neighborhood, so as to prevent people in the apartment or neighbors from seeing the stop. Once petitioner's car turned off Lake Drive, the officers positioned themselves directly behind it and allowed it to pass through an intersection and turn off a crowded street. At that point, the officers pulled the car over in the parking lot of a fire station. In all, the car traveled about one mile from the apartment. Pet. App. 3a-4a & nn.2-3; Gov't C.A. Br. 4-5; C.A. App. A117-A119.

After pulling the vehicle over, the officers conducted pat-down searches of petitioner and Middleton for weapons. They found keys, including the key to the Lexus, in petitioner's front left pocket. At Officer Sneider's request, petitioner identified himself and produced a driver's license with an address in Bay Shore, New York—consistent with the informant's report of previous encounters with "Polo." Petitioner told Officer Sneider

that he was "coming from [his] house" at 103 Lake Drive. Middleton also identified himself and told Officer Gorbecki that petitioner was driving him home so that he could comply with a curfew imposed as a condition of his parole. Middleton stated that petitioner's residence was 103 Lake Drive. The officers placed both men in handcuffs. In response to petitioner's inquiry as to why they were being "arrested," the officers informed both men that they were being detained, but not arrested, incident to the execution of a search warrant in the basement apartment of 103 Lake Drive. Petitioner responded: "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your investigation." Pet App. 4a-5a, 25a; Gov't C.A. Br. 7.

The officers summoned a patrol car to return petitioner and Middleton to 103 Lake Drive while the officers drove petitioner's car to that location. Upon their return, petitioner and Middleton were informed that during the search of the apartment the police had discovered a gun and drugs in plain view. Petitioner and Middleton were arrested, and petitioner's house key and car key were seized incident to the arrest. In total, less than ten minutes elapsed between the stop of petitioner's car and his formal arrest. Later that evening, an officer discovered that one of the keys on petitioner's key ring opened the door of the basement apartment. Pet. App. 5a; Gov't C.A. Br. 8.

2. A grand jury charged petitioner with one count of possessing at least five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and one count of possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). Petitioner

moved to suppress the physical evidence, including his house key and car key, as well as his statements to the officers, on the grounds that they were the tainted fruit of an illegal detention and search.

Following an evidentiary hearing, the district court denied the motion to suppress. Pet. App. 22a-57a. As relevant here, the court first held that petitioner's detention was lawful under *Michigan* v. *Summers*, 452 U.S. 692 (1981). Pet. App. 22a-35a. The court found that the officers' authority to detain petitioner incident to the search of his apartment was not strictly confined to the physical premises of the apartment, *id.* at 28a-31a, and that the detention here was permissible because it "took place at the earliest practicable location that was consistent with the safety and security of the officers and the public," *id.* at 31a.

In the alternative, the court held that petitioner's detention was a lawful investigative detention based on reasonable suspicion under *Terry* v. *Ohio*, 392 U.S. 1 (1968). Pet. App. 36a-42a. The court found that because petitioner matched the informant's description of the person trafficking drugs from the Lake Drive apartment, the officers had reasonable suspicion to conduct a *Terry* stop. *Id.* at 38a-39a. Moreover, given that the officers were searching for a gun at the apartment, they were justified in conducting a pat-down search of petitioner during the stop and placing him in handcuffs while they transported him back to the apartment. *Id.* at 39a. The court also found that the officers acted reasonably in transporting petitioner a short distance to the search site rather than staying in front of the firehouse while the warrant was executed. *Id.* at 42a.

Petitioner was convicted on all counts after a trial.

3. The court of appeals affirmed. Pet. App. 1a-20a. As relevant here, the court agreed with the district court that petitioner's detention during the search of his residence was reasonable under *Summers*. The court found no reason to limit *Summers* to detentions occurring at or inside the threshold of a residence, or any similar "bright-line rule." *Id.* at 13a. It explained that instead, "[t]he guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the preservation of evidence." *Ibid.* In that regard, the court recognized that the concerns animating *Summers*—in particular, "prevention of flight" and "minimizing the risk of harm to the officers," *id.* at 14a n.6 (citation omitted)—could equally justify the brief detention of an occupant who leaves the premises during or immediately prior to the execution of the search warrant and is detained a few blocks away. *Id.* at 10a, 13a-16a.

The court of appeals noted that "the Eighth and Tenth Circuits apparently concluded that once an occupant leaves a premises subject to search without knowledge of the warrant, *Summers* is inapplicable." Pet. App. 13a. But the court rejected that view because it "would put police officers executing a warrant in an impossible position: when they observe a person of interest leaving a residence for which they have a search warrant, they would be required either to detain him immediately (risking office safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered)." *Id.* at 14a. The court concluded that "*Summers* imposes upon police a duty based on both

geographic *and* temporal proximity; police must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search." *Id.* at 15a.

Applying that standard, the court of appeals had "no trouble concluding that [petitioner's] detention was lawful under the Fourth Amendment." Pet. App. 15a. The court found that the officers' decision to wait until petitioner had driven out of view of the house before detaining him was "reasonable and prudent." *Ibid.* In particular, the court explained, the officers had a valid concern for their own safety: because the search warrant authorized a search for a gun and petitioner matched the informant's description of the occupant of the residence to be searched, the officers could reasonably conclude that detaining petitioner at the residence might pose a risk to their safety. See *ibid.* (noting that the execution of a warrant "is the kind of transaction that may give rise to sudden violence") (quoting *Summers*, 452 U.S. at 702). The court further explained that because the officers had reason to believe that the occupant of the residence sold drugs out of the apartment, it was reasonable for them to conclude that detaining petitioner immediately outside the apartment might alert any occupants of the premises to their presence, thus risking the destruction of evidence. *Ibid.* The court also noted that petitioner's detention was brief: he was detained for less than ten minutes before being returned to 103 Lake Drive (where he was formally arrested), and the officers "did not attempt to exploit the detention by trying to obtain additional evidence from [petitioner] during execution of the search warrant." *Id.* at 16a.

Accordingly, the court concluded that "[b]ecause the officers acted as soon as reasonably practicable in de-

taining [petitioner] once he drove off the premises subject to search, * * * his detention during the valid search of the house did not violate the Fourth Amendment." Pet. App. 16a. Because of that holding, the court did not decide whether petitioner's detention was also reasonable as a *Terry* stop. *Id.* at 16a n.7.

ARGUMENT

Petitioner renews his claim (Pet. 8-17) that his detention violated the Fourth Amendment and that the keys found on his person and the statements he made at the time his car was stopped should be suppressed as fruits of that violation. The court of appeals correctly rejected that claim. While some tension over the proper analysis of *Michigan* v. *Summers*, 452 U.S. 692 (1981), exists in the lower courts, no square conflict currently exists that requires this Court's intervention. The Court denied review of similar questions in *Castro-Portillo* v. *United States*, 552 U.S. 829 (2007) (No. 06-10538), and *Alberto Cavazos* v. *United States*, 537 U.S. 910 (2002) (No. 02-5348), and the same result is warranted here, particularly because petitioner's detention was justified by reasonable suspicion quite apart from *Summers*.

1. The court of appeals correctly held that the considerations that led this Court to find reasonable the detention in *Summers*, equally support the conclusion that petitioner's brief detention here was reasonable.

a. In *Summers*, this Court explained that the detention of an occupant of a place about to be searched for contraband pursuant to a warrant only marginally intrudes upon the occupant's privacy interests (452 U.S. at 701-702), while such detention advances substantial law enforcement interests such as "preventing flight," "minimizing the risk of harm to the officers," and "orderly

completion of the search" (*id.* at 702-703). For those reasons, "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted," and such detention "is constitutionally reasonable." *Id.* at 705. The *Summers* rule, this Court has since noted, is categorical. See *Muehler* v. *Mena*, 544 U.S. 93, 98 (2005).

As the court of appeals recognized, the "very interests at stake in *Summers*" establish that a detention like the one here is reasonable. Pet. App. 14a. As for the effect on the person being detained: the search itself, and the fact that the detention will be only marginally more intrusive than the search, are the same whether the initial detention occurs in the residence, at the threshold, or nearby. The interests of law enforcement too are similar to those described in *Summers*: If law enforcement cannot follow and promptly detain an occupant who has just left the premises, the occupant might soon return. Or the occupant might learn from a neighbor that his residence was being searched and flee. And *Summers*'s observation about how an occupant's presence will often facilitate the "orderly completion of the search," 452 U.S. at 703, applies equally whether the occupant is kept on the premises or must be brought a short distance back to the premises; in either case, the occupant can assist in opening any locked doors or containers.

b. Petitioner argues (Pet. 13-17) that *Summers*'s reasoning implies that it is unreasonable to detain someone who has left the immediate area of the place to be searched. But *Summers* itself noted that it did "not view the fact that respondent was leaving his house when the officers arrived to be of constitutional signifi-

cance." 452 U.S. at 702 n.16; see *ibid.* ("The seizure of respondent on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside."). The question is not whether the officers detained petitioner while he happened to still be on the premises, but whether they detained him "as soon as practicable" (Pet. App. 14a-15a) after the officers saw him leaving the premises. See *id.* at 15a ("[W]hile '[t]he proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply *Summers*, . . . it is by no means controlling.'") (quoting *United States* v. *Cavazos*, 288 F.3d 706, 712 (5th Cir.), cert. denied, 537 U.S. 910 (2002)). In other words, "the focus [in applying *Summers*] should be on whether police detained the defendant as soon as practicable after departing the premises, which 'will normally, but not necessarily, result in detention of an individual in close proximity to his residence.'" *United States* v. *Castro-Portillo*, 211 Fed. Appx. 715, 721 (10th Cir.) (unpublished) (quoting *United States* v. *Cochran*, 939 F.2d 337, 339 (6th Cir. 1991), cert. denied, 502 U.S. 1093 (1992)), cert. denied, 552 U.S. 829 (2007).[2]

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[2] See also *United States* v. *Montieth*, 662 F.3d 660, 666 (4th Cir. 2011) (upholding detention of occupant approximately one mile from the residence to be searched; court "decline[d] to delineate a geographic boundary at which the *Summers* holding becomes inapplicable" and instead looked to whether occupant was detained "as soon as practicable" after the police saw him leave the residence); *United States* v. *Bullock*, 632 F.3d 1004, 1018-1021 (7th Cir. 2011) (upholding detention a few blocks from the residence); *United States* v. *Head*, 216 Fed. Appx. 543, 546 (6th Cir. 2007) (unpublished) ("Summers does not impose upon police a duty based on geographic proximity") (quoting *Cochran*, 939 F.2d at 339); *Castro-Portillo*, 211 Fed. Appx. at 721 (upholding detention two blocks from residence because police detained defen-

Petitioner also asserts (Pet. 14-17) that the law enforcement interests underlying the *Summers* rule dissipate once an occupant drives away from the premises to be searched. As the court below explained, however, "[a]t least two of the law enforcement interests articulated in *Summers* applied here—namely, prevention of flight should incriminating evidence be found during the search and minimizing the risk of harm to the officers." Pet. App. 14a n.6 (quoting *id.* at 30a). Petitioner suggests (Pet. 15) that the interest in preventing flight is attenuated when the individual has already left the premises before the search has begun because he would have "no reason to know that a search is imminent." But anyone on the premises or nearby could readily alert a departing occupant to the search by placing a call to his cell phone or sending him a text message.

Petitioner also argues (Pet. 15) that once an individual leaves the premises to be searched, he poses "a minimal risk, if any" to the officers executing the warrant. But as noted above, neighbors or persons still at the premises to be searched could alert the departing occupant to the presence of the search team. Petitioner posits (Pet. 15) that if the individual learns of the search and returns to the premises to obstruct the search, he could be detained at that time. But it is far safer for officers to "'exercise unquestioned command of the situation' at precisely the moment when *Summers* recognizes they most need it," Pet. App. 14a (quoting *Summers*, 452 U.S. at 703), by detaining the departing occupant rather than letting him leave and risking the possibility

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dant as soon as reasonably practicable); *Cavazos*, 288 F.3d at 711-712 (upholding a detention incident to a warrant-authorized search and rejecting the defendant's argument "that the two blocks between him and his residence should foreclose the application of *Summers*").

that he will suddenly return—possibly armed and with the assistance of others—to obstruct the search. See *Castro-Portillo*, 211 Fed. Appx. at 721 ("[T]he fact that [the defendant] was leaving the scene and did not have knowledge of the search warrant did not mean he did not pose a threat to officers executing the warrant, as he may have returned home unexpectedly while the search was ongoing and, once there, '[tried] to forcibly thwart execution of the warrant.'") (quoting *United States* v. *Ritchie*, 35 F.3d 1477, 1484 (10th Cir. 1994)).

Finally, petitioner urges (Pet. 14-15) that a detention away from the immediate vicinity of the premises to be searched is more intrusive than a detention at the premises itself because the former exposes the individual to the indignity of detention in full public view. But *Summers* itself approved a detention outside the defendant's residence, and whether an individual is detained as he is exiting his premises or a short distance away, the detention will perforce be in public view.[3]

2. Petitioner urges (Pet. 8-12) that review by this Court is necessary to resolve a "deep and longstanding" conflict among lower courts over *Summers*'s application to the detention of suspects who have "left the immediate vicinity of the premises to be searched." While some tension exists over the reach of *Summers*, no square conflict exists that warrants this Court's review.

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[3] Amicus National Association of Criminal Defense Lawyers contends (Br. 3) that *Summers*'s "categorical authorization [for certain detentions] has been extended by lower courts beyond the core circumstances that supported the original rule" and this Court now needs to "realign the scope of the rule with its justifications." But for the reasons explained in the text, courts have correctly recognized that *Summers*'s rationale applies equally whether the occupant is detained on the premises or detained as soon as practicable after leaving the premises.

a. Seven federal courts of appeals have declined to append an inflexible geographical component onto the *Summers* rule. See Pet. App. 13a-15a (2d Cir.); *United States* v. *Montieth*, 662 F.3d 660, 666-669 (4th Cir. 2011); *Cavazos*, 288 F.3d at 711-712 (5th Cir.); *Cochran*, 939 F.2d 338-339 (6th Cir.); *United States* v. *Bullock*, 632 F.3d 1004, 1018-1021 (7th Cir. 2011); *Castro-Portillo*, 211 Fed. Appx. at 720-724 (10th Cir.); *United States* v. *Sears*, 139 Fed. Appx. 162, 166 (11th Cir.) (unpublished), cert. denied, 546 U.S. 971 (2005).

b. Petitioner cites (Pet. 8-10) older decisions from the Eighth, Ninth, and Tenth Circuits as in conflict with the decision below. None establishes a conflict that warrants this Court's review. Each was decided before *Muehler*, and—contrary to *Muehler*'s teaching that *Summers* articulates a categorical rule—each engages in an *ad hoc* reweighing of the interests at stake in the particular case. Moreover, the Ninth and Tenth Circuits have since limited or cast doubt on their older cases. And the Eighth Circuit does not appear to have decided a case in which that court's interpretation of *Summers* was outcome-determinative.

i. Petitioner relies on *United States* v. *Edwards*, 103 F.3d 90 (10th Cir. 1996), *United States* v. *Sherrill*, 27 F.3d 344 (8th Cir.), cert. denied, 513 U.S. 1048 (1994), and *United States* v. *Taylor*, 716 F.2d 701 (9th Cir. 1983), to establish a division among the courts of appeals. Each of those decisions applies *Summers* in a way that this Court has since made clear (in *Meuhler*) is incorrect.

In *Edwards*, the defendant was detained for 45 minutes after he had driven three blocks away from the house to be searched. 103 F.3d at 91. During that time, the defendant was searched, the defendant's car was

searched, the defendant was handcuffed, weapons were drawn on the defendant, and no effort was made to return the defendant to the site of the search. *Id.* at 91-92. The Tenth Circuit concluded that *Summers* did not justify the extended detention because (1) the defendant did not in fact know of the search warrant, (2) the police knew of the locations the defendant would likely return to, reducing the concern that they would be unable to later arrest the defendant, (3) "the police could have 'tailed' [the defendant]" after conducting a *Terry* stop of his vehicle, and (4) the detention did not facilitate completion of the search, aside from supplying keys to the place to be searched, which the defendant provided early on in the detention. *Id.* at 93-94.

In *Sherrill*, the Eighth Circuit ultimately found that the detention of a defendant stopped one block from his house was justified by probable cause. 27 F.3d at 346-347. But as an initial matter, it declined to apply *Summers* because (1) the outdoor stop of the defendant was in the court's view more intrusive on the defendant's interests than the stop in *Summers* (but see *Summers*, 452 U.S. at 702 n.16), and (2) the defendant was unaware of the search warrant and thus "the officers had no interest in preventing flight or minimizing the search's risk." 27 F.3d at 346.

In *Taylor*, the defendant was driving away from the house about to be searched pursuant to a warrant; he was stopped, ordered to lie down in a ditch, and handcuffed. 716 F.2d at 705. The Ninth Circuit ultimately upheld the stop and arrest as supported by reasonable suspicion and then probable cause. *Id.* at 707-709. But as an initial matter, it declined to apply *Summers*. *Id.* at 707. In keeping with *Summers* itself (see 452 U.S. at 702 n.16), the Ninth Circuit found "no merit to [the de-

fendant's] attempt to distinguish *Summers* on the ground[] that he * * * was not at the premises when detained." *Taylor*, 716 F.2d at 707. But the Ninth Circuit went on to find it significant that "much of the justification for the rule announced in *Summers* is inapplicable to [the defendant's] situation" because (1) neither an interest in completing the search nor in preventing flight subjectively "motivated [the officer's] detention of [the defendant]," and (2) the defendant "was obviously in no position to facilitate the orderly completion of the search * * * while lying handcuffed face down in a ditch." *Ibid.*

The analytical approach in each of those cases is incorrect because each considers the interests identified in *Summers* and evaluates them in light of the particular facts of the case at hand. But "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" *Muehler*, 544 U.S. at 98 (quoting *Summers*, 452 U.S. at 705 n.19).

ii. The Tenth Circuit's decision in *Castro-Portillo* recognizes that the approach of those older cases is inconsistent with *Summers* and does not survive *Muehler*. In *Castro-Portillo*, the defendant left his house just before a warrant authorizing a search of the house for drugs and weapons was executed, and he was briefly detained two blocks away. He was ordered to exit his car, handcuffed, and frisked for weapons. He was returned to his home, where officers had started the search. *Castro-Portillo*, 211 Fed. Appx. at 717. The court upheld the defendant's detention as permissible under *Summers* and *Muehler*. *Id.* at 720-724. The court explained that "when a neutral magistrate has deter-

mined police have probable cause to believe contraband exists" in a particular home, "the connection of an occupant to [the] home *alone* justifies a detention of that occupant." *Id.* at 720 (quoting *Muehler*, 544 U.S. at 99 n.2) (emphasis added by *Castro-Portillo*).

Castro-Portillo emphasized that "[t]he fact [the defendant] was not observed committing a crime at the time of the stop, drove away from the house moments before the execution of the search warrant, and did not know about the search warrant did not prevent authorities from having the requisite suspicion to stop him." 211 Fed. Appx. at 721. And relying on the Sixth Circuit's decision in *Cochran*, the *Castro-Portillo* court found distinctions based on place of detention insignificant, because "*Summers* does not impose upon police a duty based on geographic proximity (*i.e.*, defendant must be detained while still on his premises)." *Ibid.* (quoting *Cochran*, 939 F.2d at 339). Rather, "the focus should be on whether police detained the defendant as soon as practicable after departing the premises." *Ibid.*

Castro-Portillo accordingly rejected the defendant's contention that it should follow *Edwards* or *Sherrill*. It found *Edwards* factually distinguishable in that the detention in *Castro-Portillo* "occurred during the search of the house and * * * was not 'unduly prolonged' prior to execution of the search warrant," but instead was "as short as the situation and search warranted." 211 Fed. Appx. at 722 (quoting *Summers*, 452 U.S. at 701). And of particular relevance here, *Castro-Portillo* expresses doubt about *Sherrill*'s correctness in light of *Muehler*. See *id.* at 722 n.3.

Similarly, the Ninth Circuit has recognized *Muehler*'s command that *Summers* states a categorical rule, and that court has accordingly emphasized the aspects

of its cases that are consistent with *Muehler*. See *United States* v. *Davis*, 530 F.3d 1069, 1080 (9th Cir. 2008) (citing *Taylor* for the proposition that it had "rejected attempts to distinguish *Summers* based on the fact[] * * * that the detainee was not at the premises when detained.").

The Eighth Circuit has not had a similar opportunity since *Muehler* to revisit its decision in *Sherrill*. That weighs against this Court's review at this time not only because the Eighth Circuit may align itself with the majority of circuits, but also because *Sherrill* itself has, to the government's knowledge, never proven outcome-determinative. In particular, no decision from the Eighth Circuit itself or any district court within the Eighth Circuit appears to rely on *Sherrill*'s interpretation of *Summers* to find a Fourth Amendment violation.[4] Indeed, *Sherrill*'s treatment of *Summers* was not outcome determinative in *Sherrill* itself. See 27 F.3d at 346-347 (finding defendant's arrest supported by probable cause).

c. The state cases petitioner cites (Pet. 10-11) also do not establish a division of authority that warrants this Court's review. Each of those cases found *Summers* not to apply for factual reasons not presented here. In particular, in *Parks* v *Commonwealth*, 192 S.W.3d 318

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[4] In *United States* v. *Reinholz*, 245 F.3d 765, cert. denied, 534 U.S. 896, and 534 U.S. 933 (2001), the Eighth Circuit rejected the argument that *Summers* supported officers' arrest of the defendant as he was leaving his workplace, "at least a twenty-five minute drive from his residence," which was the place to be searched. *Id.* at 777-778. And the court ultimately found a Fourth Amendment violation because the arrest was not otherwise supported by probable cause. *Id.* at 778-779. But those facts are readily distinguishable from cases in which the defendant is seen leaving the scene of the search and is detained as soon as practicable thereafter.

(Ky. 2006), the court found that *Summers* did not apply because the defendant had departed the residence to be searched "before the warrant was issued." *Id.* at 334. In *State* v. *Hill*, 130 P.3d 1 (Kan. 2006), the court emphasized that "[p]rior to the execution of the search * * * [the defendant] had been arrested and was in police custody at the police station," not merely detained on the street or at the place being searched. *Id.* at 10. And in *Commonwealth* v. *Charros*, 824 N.E.2d 809 (Mass.), cert. denied, 546 U.S. 870 (2005), a number of factors not present here seemed to bear on the court's refusal to apply *Summers*. See *id.* at 816 (noting the "spectacular fashion" in which police stopped the defendant's van, the "indignity of [the defendant's] arrest in full view of the public" during rush hour, and the "palpable potential for exploitation [of the stop] by the officers, who otherwise had no authority to search [the defendant's] van"). To the extent *Charros* speaks clearly to the issue here, it does not assist petitioner: It discusses but does not disagree with the Sixth Circuit's decision in *Cochran*, *supra*. *Charros*, 824 N.E.2d at 817. And *Charros* contrasts the stop at issue—in a place "with no connection to the premises to be searched"—with the stop at issue in *Commonwealth* v. *Catanzaro*, 803 N.E.2d 287 (Mass. 2004), in which the court had approved a stop of the defendant "as soon as reasonably practicable on leaving [the premises to be searched]." 824 N.E.2d at 817.

3. In any event, this case would be an unsuitable vehicle for addressing the application of *Summers* to the initial detention of someone shortly after he leaves the premises about to be searched.

a. Even putting *Summers* aside, petitioner's detention did not violate the Fourth Amendment because (as the district court found, Pet. App. 36a-42a) the informa-

tion known to the officers established reasonable suspicion to conduct a *Terry* stop of the car, see Gov't C.A. Br. 31-34, which evolved into probable cause as events unfolded. The officers had probable cause (as evidenced by a valid search warrant) to believe that the Lake Drive apartment from which petitioner exited contained a weapon. They knew from the informant that "Polo" had sold the informant illegal drugs on multiple occasions, including out of the Lake Drive apartment. Petitioner left the Lake Drive apartment in the company of another person, both of whom matched the informant's description of "Polo." Taken together, that information supplied the officers reasonable suspicion to conduct an investigatory stop.

Because the object of the search warrant was a weapon, it was also reasonable for the officers to conduct a pat-down search of petitioner. Immediately after the officers stopped the car and frisked petitioner, he admitted that he lived at the Lake Drive residence to be searched, but he produced a driver's license showing a Bay Shore address; this was significant because the informant had told officers that "Polo" had previously sold him drugs in Bay Shore, but most recently sold them from the Lake Drive apartment. Those developments gave the officers probable cause to believe that petitioner was in fact "Polo," to believe petitioner had repeatedly sold illegal drugs to the informant, and therefore to arrest petitioner.

b. This case is also a poor vehicle for review of any Fourth Amendment issue because any error in admitting the fruits of the detention was harmless. Ample evidence at trial established petitioner's control of the Lake Drive apartment. First, several documents bearing petitioner's name were found during the warrant-

authorized search of that residence: an identification card, old letters, a mail money receipt, an old tax mailing, and KMart pay stubs. No documents were found bearing anyone else's name. Second, Middleton testified that petitioner had led him to the Lake Drive apartment—which he understood to be petitioner's new apartment—where they played video games. The informant likewise testified that petitioner had taken him to the Lake Drive apartment, where petitioner sold him crack cocaine. Third, Middleton and the informant both testified that petitioner had moved from his Bay Shore residence to a new apartment in Wyandanch shortly before the search, and Middleton testified that he had seen "a lot of boxes" in the Wyandanch apartment. Gov't C.A. Br. 34-35. The evidence petitioner says should have been suppressed—the keys and his statements—was cumulative of that independent evidence demonstrating petitioner's control over the Lake Drive apartment, and thus any error in admitting the keys and statements was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

RECORD
AND
BRIEFS

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No. 11-770

In the Supreme Court of the United States

CHUNON BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 11-770

CHUNON BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In the decision under review, the Second Circuit carefully catalogued a preexisting circuit conflict on the question whether, pursuant to *Michigan* v. *Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises to be searched. See Pet. App. 10a-13a. And after extensive analysis, the Second Circuit came down on one side of that conflict, holding that such a detention is permissible. See *id.* at 13a-16a.

In the face of the Second Circuit's opinion, the government does not seriously dispute that a conflict exists. The government nevertheless contends that the conflict does not warrant the Court's review at this time and in this case. But the government offers no valid reason

why the Court should abstain from resolving the conflict at this time. And the purported vehicle problems the government identifies with this case are illusory and pose no obstacle to the Court's resolution of the question presented. For the reasons stated in the petition, this case is a straightforward and compelling candidate for certiorari.

1. a. In its brief in opposition, the government essentially concedes the existence of a conflict. See, *e.g.*, Br. in Opp. 12 (acknowledging that "some tension exists over the reach of *Summers*"); *id.* at 13 (contending that decisions of the Eighth, Ninth, and Tenth Circuits "appl[y] *Summers* in a way that * * * is incorrect"). That concession was wise, because not only the Second Circuit in this case, but numerous other courts—and even the government itself in its brief below—have acknowledged the conflict. See, *e.g.*, *United States* v. *Montieth*, 662 F.3d 660, 666-667 (4th Cir. 2011); *United States* v. *Bullock*, 632 F.3d 1004, 1019-1020 (7th Cir. 2011); Gov't C.A. Br. 29. To be sure, the government picks at the edges of the cases on petitioner's side of the conflict. See Br. in Opp. 13-15, 17-18. But the government ultimately does not dispute that, under the legal standards established in each of those cases, a detention of the type that occurred here would be invalid under *Summers*. That is all that is required to establish a conflict satisfying the criteria for certiorari.

b. The government instead advances two prudential reasons why, in its opinion, the conflict does not "currently" warrant the Court's review. Br. in Opp. 8; see *id.* at 15-17. Both of those reasons are unavailing.

First, seemingly inspired by a footnote in an unpublished opinion, the government contends that further review would be premature in light of the Court's decision in *Muehler* v. *Mena*, 544 U.S. 93 (2005). See Br. in Opp.

15-17. Even if all of the decisions on petitioner's side of the conflict had predated *Muehler* (and none of the state-court decisions do, see Pet. 10-11), *Muehler* does not bear, even tangentially, on the question presented here.

The actual holding of *Muehler* was that, *during* a valid *Summers* detention, the police may detain the occupants of the premises in appropriate restraints and question them even on unrelated subjects. See 544 U.S. at 100, 101. In the passing statement on which the government relies, by contrast, *Muehler* merely clarified what *Summers* had already established: *viz.*, that the rule that officers executing a search warrant may detain the occupants of the premises is a "categorical" one. *Id.* at 98; see *Summers*, 452 U.S. at 703-704, 705 n.19. In so stating, the Court in no way altered the approach courts should follow in determining the *reach* of that categorical rule—and, specifically, in considering whether to extend the rule beyond the circumstances presented in *Summers* (where the detention occurred within the immediate vicinity of the premises to be searched).

Both before and after *Muehler*, the correct methodology is to analyze the applicability of the rationales that justified the categorical rule in the first place. That is the methodology this Court used in *Arizona* v. *Gant*, 556 U.S. 332 (2009), when it declined to extend the analogous categorical rule of *New York* v. *Belton*, 453 U.S. 454 (1981). See NACDL Br. 10-14. That is the methodology the government itself uses in arguing that the Second Circuit's holding in this case was correct. See Br. in Opp. 8-12. And that is the methodology the courts on petitioner's side of the conflict have used in holding that detentions are invalid under *Summers*—even if there has inevitably been some variation in emphasis in those courts' analyses of the *Summers* rationales. See, *e.g.*, *United States* v. *Sherrill*, 27 F.3d 344, 346 (8th Cir.)

(noting that the occupant was unaware of the search warrant when he was stopped), cert. denied, 513 U.S. 1048 (1994); *Commonwealth* v. *Charros*, 824 N.E.2d 809, 816 (Mass.) (observing that the location of the stop had no connection to the premises to be searched), cert. denied, 546 U.S. 870 (2005).

Second, the government resorts to the last refuge of a party opposing certiorari: a suggestion that the conflict in the lower courts will eventually resolve itself. See Br. in Opp. 15-17. That may be a valid justification for denying certiorari where the petitioner is relying on the decision of an outlying circuit in a lopsided conflict, especially if that decision predates the conflicting decisions. But it carries little weight where, as here, there are *three* circuits (and at least three state courts of last resort) that have held *Summers* inapplicable when the detained individual has left the immediate vicinity of the premises to be searched—and where all but one of those decisions *postdate* at least one of the conflicting decisions. See *United States* v. *Cochran*, 939 F.2d 337 (6th Cir. 1991), cert. denied, 502 U.S. 1093 (1992).

The only affirmative indication the government cites for the proposition that any of those courts are backing away from their position is an unpublished decision of the Tenth Circuit. See Br. in Opp. 15-16 (citing *United States* v. *Castro-Portillo*, 211 Fed. Appx. 715, cert. denied, 552 U.S. 829 (2007)).* If unpublished decisions are relevant to the analysis, however, two can play that

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* The government also cites *United States* v. *Davis*, 530 F.3d 1069 (9th Cir. 2008). See Br. in Opp. 17. But *Davis* is inapposite because it involved the detention of an individual who came to the premises while the search was ongoing (and was in the driveway when detained). See 530 F.3d at 1075.

game. See, *e.g.*, *United States* v. *Chambers*, 132 Fed. Appx. 25, 31-32 (5th Cir. 2005) (per curiam) (suggesting that one of the cases on the government's side of the conflict—*United States* v. *Cavazos*, 288 F.3d 706 (5th Cir.), cert. denied, 537 U.S. 910 (2002)—should be limited to its facts). In the two decades the conflict has existed, no court on either side has actually reversed course. The odds that *all* of the courts on petitioner's side will do so—a process that would require en banc review in three federal circuits—are longer than those of drawing to an inside straight.

2. Perhaps recognizing the existence of a conflict otherwise warranting this Court's review, the government uncharacteristically begins its cert-stage brief with an extended discussion of the merits. See Br. in Opp. 8-12. For present purposes, it should suffice to note that the parties' sharply contrasting views about the applicability of the *Summers* rationales underscore the need for this Court's review. Compare *ibid.* with Pet. 13-17. But one point demands a response here.

The government contends (Br. in Opp. 9, 11-12) that the detention of an individual away from the immediate vicinity of the premises to be searched is justified by the interests in preventing flight and minimizing the risk of harm to officers, even where the individual has no reason to know that a search is imminent. To begin with, it is worth reflecting on the relative implausibility of the scenario that such an individual would subsequently learn of the search and then return to the scene in an attempt to overpower the police. But even leaving that aside, the government's approach would seemingly justify detaining any individual believed to be an occupant of the premises to be searched, regardless of where the detention occurs—whether at the individual's workplace, at the supermarket, or in the next town over. Under such an ap-

proach, the issuance of a search warrant would justify the functional equivalent of a pre-search arrest of anyone associated with the place to be searched—even though the very point of a search warrant will ordinarily be to establish probable cause to *justify* an arrest in the first place. That cannot be the law, and it illustrates why clarification of the boundaries of the *Summers* rule is sorely needed.

3. The government briefly identifies two purported vehicle problems with this case. See Br. in Opp. 18-20. Those problems are illusory and pose no obstacle to the Court's resolution of the question presented.

First, the government contends (Br. in Opp. 18-19) that petitioner's detention could be justified under *Terry* v. *Ohio*, 392 U.S. 1 (1968), based solely on the fact that petitioner (like the other man in the car) matched a sketchy description of a suspect provided by a confidential informant. But as the government acknowledges (Br. in Opp. 8), the court of appeals expressly declined to consider that basis for the detention. See Pet. App. 16a n.7. And as the government also acknowledges (Br. in Opp. 18), any argument that *Terry* justifies the detention is in no way logically antecedent to, or dependent upon the resolution of, the question presented here. Should this Court hold that the rule of *Summers* does not extend to petitioner's detention, therefore, it could readily leave the discrete *Terry* issue for the court of appeals on remand in the event of a reversal—as it has previously done in materially identical circumstances. See, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1053 (1983).

Second, the government contends (Br. in Opp. 19-20) that any error in admitting the fruits of the detention was harmless. The government made that argument only in passing below, see Gov't C.A. Br. 34-35, and for good reason. The government does not dispute that the

central issue at petitioner's trial was whether the prosecution could link petitioner to the guns and drugs found in the apartment. See Pet. 5. Nor does it dispute that, in attempting to do so, the prosecution heavily relied on the fruits of the detention—*viz.*, the key to the apartment and the statements made by petitioner seeming to identify the apartment as his residence. See *ibid.*; Pet. C.A. Br. 24 n.5, 25 n.6 (quoting the prosecution's extensive statements at trial regarding that evidence). In light of the centrality of that issue and that evidence, it is certainly not clear *beyond a reasonable doubt* that petitioner would have been convicted on the basis of the much more circumstantial evidence on which the government relies (including the testimony of an ex-convict)—particularly given the testimony of the building's owner that she had rented the apartment not to petitioner but to another man. See Pet. C.A. Br. 21, 22-24. And as with the *Terry* issue, this Court could readily leave any harmless-error inquiry for the court of appeals on remand in the event of a reversal—as the Court has indicated it prefers to do. See, *e.g.*, *Rose* v. *Clark*, 478 U.S. 570, 584 (1986).

* * * * *

At bottom, the case for certiorari here is a simple one. There is a deep, longstanding, and widely recognized conflict on the reach of the *Summers* rule. And if the Court is interested in resolving that conflict, it will never have a better opportunity to do so than it does in this case. The Court should grant review and decide once and for all an important question of Fourth Amendment law.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHUNON BAILEY,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of petitioner in *Bailey v. United States*, No. 11-770.[1]

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. *Amicus* timely notified each party of its intent to file this brief, and letters reflecting the consent of both sides are attached to the certificate of service.

INTRODUCTION AND SUMMARY

In *Michigan v. Summers*, 452 U.S. 692 (1981), this Court held that police officers executing a search warrant for contraband could detain all occupants of a dwelling while searching the premises. *Id.* at 705. Under the rule announced in *Summers*, an "officer's authority to detain incident to a search is categorical," and no individualized assessment of the reasonableness of the detention is needed. *Muehler v. Mena*, 544 U.S. 93, 98 (2005).

As the petition for certiorari in this case shows, a deep conflict has developed in the circuits regarding whether the *Summers* rule allows the seizure and detention of an individual who has left the immediate vicinity of the premises before the warrant is executed. *See* Pet. for Cert., No. 11-770 (filed Dec. 16, 2011). That conflict is substantial, pressing, and ripe for the Court's review.

Amicus NACDL writes to emphasize two points. First, the broad, categorical authorization of police conduct approved by *Summers* is far afield from the more typical Fourth Amendment reasonableness analysis exemplified in *Terry v. Ohio*, 392 U.S. 1 (1968). Courts apply the bright-line rule of *Summers* to permit lengthy and sometimes uncomfortable detentions without a warrant, without probable cause, and without any individualized showing of reasonable suspicion. Moreover, the *Summers* rule permits this detention even when there is no evidence of any potential risk to the police officer. Because of this broad scope, it is essential to ensure that the boundaries of the rule are clear and encompass only those circumstances where a search would indeed be "reasonable."

Second, in a few contexts other than *Summers* this Court has laid down bright-line rules permitting the police to engage in searches or seizures without any need for individualized suspicion. These categorical rules have historically expanded over time, however, as lower courts apply the rule to ever more divergent contexts. Indeed, police conduct authorized by a categorical rule often comes to be seen as a police entitlement rather than a carefully struck compromise of competing concerns. When faced with situations where a categorical authorization has been extended by lower courts beyond the core circumstances that supported the original rule, this Court has not hesitated to realign the scope of the rule with its justifications, ensuring that the contours of the rule adhere to the essential Fourth Amendment requirement that all seizures be reasonable.

The rule of *Summers* has expanded beyond its justifications. It is being applied by a number of courts of appeals, including the court of appeals below, in ways at odds with its original rationale. This case perfectly illustrates the problem, and thus is an ideal vehicle for clarifying and confirming the limits on the *Summers* rule. Certiorari should be granted.

ARGUMENT

In this case, defendant Chunon Bailey was pulled over by the police about a mile from an apartment where the police had a search warrant. Pet. App. 24a-25a. He was told to exit his car, was patted down, and had his keys, wallet, and other personal items confiscated. Pet. App. 25a. The officers had not seen him break any laws, and found nothing incriminating or suspicious in their search. Pet. App.

3a-4a, 24a-25a. He was nevertheless questioned, handcuffed, put in the back of a police vehicle, and driven back to the apartment to await the results of a search of the premises. Pet. App. 26a. Police officers also seized his car, and an officer drove it back to the apartment. Pet. App. 25a.

This detention constituted a seizure within the meaning of the Fourth Amendment. *Summers*, 452 U.S. at 696; *Terry*, 392 U.S. at 16. The court of appeals held this seizure was categorically justified solely because the police had a valid warrant to search for contraband in the apartment where Bailey allegedly lived. Pet. App. 13a-16a. That ruling was incorrect, and illustrates a broader trend of decisions failing to enforce critical limits on police authority to detain persons ostensibly incident to a lawful premises search.

I. AT A MINIMUM, THE FOURTH AMENDMENT REQUIRES THAT ALL SEIZURES BE REASONABLE

A. Warrantless Seizures Are Generally Permitted Only After An Individualized Assessment Of Reasonableness

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. For centuries, this Court has applied a "familiar threshold standard of probable cause for Fourth Amendment seizures," a standard that "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule." *Summers*, 452 U.S. at 697.

The determination of whether probable cause exists must generally be made by a neutral and detached magistrate, rather than a police officer on the scene. *Terry*, 392 U.S. at 20. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

Terry v. Ohio is the classic example of an exception to the warrant requirement. Recognizing the safety concerns faced by police officers confronting unknown perils, the Court concluded that there was "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Terry*, 392 U.S. at 27.

This detention and search may be justified based on reasonable suspicion rather than probable cause, but the infringement on an individual's liberty must be "justified at its inception" based on a careful examination of the facts giving rise to reasonable suspicion. *Terry*, 392 U.S. at 20; *accord id.* at 27 ("[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."). The suspicion must be specifically directed at the person being detained. *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979). That is, based on the all the facts of the case, "a reasonably prudent man

in the circumstances [must] be warranted in the belief that his safety or that of others was in danger" from the subject of the detention and search. *Terry*, 392 U.S. at 27.

In addition to being justified at inception, any detention and search under *Terry* must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. Thus, an officer patting down a suspect must confine his search "to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29. A search that seeks evidence rather than weapons is not permitted in this context, because the justification for the stop and frisk is officer safety. *Sibron v. New York*, 392 U.S. 40, 64-65 (1968). Notably, it is the government that bears the "burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion).

B. Unlike *Terry*, *Summers* Sets Out A Categorical Rule That Eliminates Any Particularized Inquiry Into Reasonableness

In many Fourth Amendment contexts, as in *Terry* searches, the Court has focused on the need for a fact-specific inquiry and "eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quotation marks omitted). "The distinguishing feature of our criminal justice system is its insistence on principled, accountable decisionmaking in individual cases. If a person is to be

seized, a satisfactory explanation for the invasive action ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case." *Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting).

In a limited number of situations, however, the Court has adopted categorical rules, suggesting that they provide consistency and guidance for police officers on the street. *See Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997) (fact that "we typically avoid per se rules concerning searches and seizures does not mean that we have always done so"); *Dunaway v. New York*, 442 U.S. 200, 219-20 (1979) (White, J., concurring).

In *Summers*, this Court considered whether police searching for contraband under a valid warrant could detain an occupant of the premises for the duration of the search. In answering in the affirmative, the Court's opinion weighed the justifications for detention against the infringement on individual liberty, concluding that the law enforcement interests in "preventing flight in the event that incriminating evidence is found," "minimizing the risk of harm to the officers," and facilitating "the orderly completion of the search" by having an occupant to assist in unlocking spaces outweighed a detention that was "'substantially less intrusive' than an arrest." *Summers*, 452 U.S. at 702-03 (citations omitted).

As the Court later made clear, the *Summers* rule is categorical—when it applies there is no need for an individualized determination of the reasonableness of the detention. *Muehler v. Mena*, 544 U.S. 93, 98 (2005). Rather, police searching for contraband

under a valid warrant may detain *all* occupants of the premises for the duration of the search even absent any individualized reason to think any of them poses a danger to the police. *Muehler*, 544 U.S. at 98.

Because of this categorical approach, *Summers* is often applied to permit more significant curtailments on personal liberty than would be authorized under the more typical Fourth Amendment inquiry tailored to individualized circumstances.

First, *Summers* permits the detention of occupants for the entire duration of a search, which sometimes takes hours. A two- to three-hour detention has been deemed "plainly permissible" under the *Summers* categorical rule. *Muehler*, 544 U.S. at 98, 100. Applying this rule, courts have upheld substantially prolonged detentions. *E.g.*, *Unus v. Kane*, 565 F.3d 103, 110 (4th Cir. 2009), cert. denied, 130 S. Ct. 1137 (2010) (detention longer than four hours "reasonable" and not false imprisonment); *Croom v. Balkwill*, 645 F.3d 1240, 1251-52 (11th Cir. 2011) (two hour detention of elderly and infirm woman reasonable under *Summers* and *Muehler*).

Second, *Summers* permits the use of reasonable force to effect the detention. *Muehler*, 544 U.S. at 98-99. Occupants accordingly are often shackled and left that way for hours as the search proceeds. *Muehler*, 544 U.S. at 100 (woman left in handcuffs for several hours, despite requests that they be removed because of pain); *Unus*, 565 F.3d at 110 (two women handcuffed in their residence and not permitted to wear their head scarves or pray outside presence of male officers); *Croom*, 645 F.3d at 1252-53 ("Though we are skeptical that the force alleged

was truly necessary under the circumstances, we cannot find a constitutional violation based on its usage.").

Third, some lower courts apply the *Summers* rule to permit the automatic detention of visitors to the premises—i.e., not just permanent residents of the dwelling. *See* 2 Wayne LaFave, *Search and Seizure* § 4.9 nn.123-26 (West 4th ed. 2011) (collecting cases showing wide disagreement and confusion on how to apply "occupant" requirement of *Summers*). *Summers* permitted the detention of all "occupants" of the premises but did not define that term, and many courts have construed *Summers* to authorize detention of "all persons present on the premises." *United States v. Sanchez*, 555 F.3d 910, 918 (10th Cir.), cert denied, 129 S. Ct. 1657 (2009); *see United States v. Bullock*, 632 F.3d 1004 (7th Cir. 2011) (detention of defendant allowed under *Summers* even though police knew defendant did not live in building).

Finally, as in this case, a number of courts have extended *Summers* to permit the detention of individuals who have left the immediate vicinity of the property. Here, for instance, the police had been surveying the house but had not begun the search when Bailey left the premises; the Second Circuit held that the police could search an occupant seen leaving the premises as long as he was "detained as soon as reasonably practicable thereafter." Pet. App. 3a-4a, 19a; *see United States v. Montieth*, 662 F.3d 660, 666-67 (4th Cir. 2011); *Bullock*, 632 F.3d at 1011; *United States v. Cavazos*, 288 F.3d 706, 712 (5th Cir. 2002); *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991). Other courts have rejected this extension, concluding that the justifications un-

derlying *Summers* do not allow the seizure of those who have left the immediate vicinity of the premises to be searched. *E.g.*, *United States v. Edwards*, 103 F.3d 90, 93-94 (10th Cir. 1996); *United States v. Sherrill*, 27 F.3d 344, 345-46 (8th Cir. 1994).

In sum, *Summers* allows detention without an individualized finding of reasonable suspicion, and allows a far broader scope of detention than would be allowed under *Terry*. In this case, for example, the detention, handcuffing, and transportation in the police car in this case could not qualify as a valid investigatory detention under *Terry*. *See, e.g.*, *Royer*, 460 U.S. at 504-05 (holding scope of valid *Terry* stop exceeded when officers required suspect to move to a different room to await the results of a search of the suspect's luggage); *Terry*, 392 U.S. at 20 (stop must be "reasonably related in scope to the circumstances which justified the interference in the first place"); *cf. Croom*, 645 F.3d at 1251 n.15 (unlike a *Terry* stop, *Summers* allows detention for longer than the time necessary to dispel the officer's suspicions). Because *Summers* authorizes seizures undertaken without any individualized consideration that may too easily exceed the limits of reasonableness, the boundaries of the rule must be clearly drawn and strictly enforced.

II. THIS COURT HAS NOT HESITATED TO IMPOSE LIMITS ON BRIGHT-LINE RULES WHEN THEY EXPAND BEYOND THEIR JUSTIFICATIONS

Summers is not the only context in which this Court has applied a categorical rule permitting certain police conduct under the Fourth Amendment. The most notable other example is the rule that, in-

cident to a custodial arrest, the police have categorical authority to search the arrestee without the need to analyze whether it is reasonably likely that evidence or weapons would be found. *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Robinson*, 414 U.S. 218 (1973). As a corollary of this rule, this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 460 (1981).

As history shows, however, the bright-line rules set out by this Court inevitably expand as lower courts struggle to apply them to a host of different factual situations. The rule permitting a search incident to custodial arrest provides a useful illustration of this process of expansion over time—an expansion similar to the courts' improper inflation of the *Summers* rule in this case.

After years of applying this Court's *Belton* decision authorizing a search of the passenger compartment of a vehicle, "lower court decisions seem[ed] to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales" on which the rule was based. *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part); *see Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1715 (2009) ("When asked at the suppression hearing why the search was conducted, [the police officer] responded: 'Because the law says we can do it.'"); *cf. Chimel*, 395 U.S. at 767 (under earlier broad categorical rule, police could

take "the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere.").[2]

The decision in *Belton* had been grounded in earlier holdings, notably *Chimel v. California*, 395 U.S. at 763, which concluded that an exception to the warrant requirement was justified in the case of a custodial arrest because of concerns for officer safety and evidence preservation, *viz.*, the fear than an arrestee might grab a gun or destroy evidence within his reach. *Chimel*, 395 U.S. at 763. These concerns lead the *Chimel* Court to find categorical justification "for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.*

Despite the fact that *Belton* had rested on this earlier rule and relied on the same safety and evidentiary justifications, the opinion did not specifically limit the permissible vehicle search to only those areas within the arrestee's immediate control. *Belton*, 453 U.S. at 460. The opinion thus became "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no

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[2] The decision below, like other decisions extending the *Summers* rule to individuals who have left the premises, similarly treats a *Summers* detention as a police "right." *E.g.*, Pet. App. 13a ("There is no basis for drawing a 'bright line' test under *Summers* at the residence's curb and finding that the authority to detain under *Summers* always dissipates once the occupant of the residence drives away." (alteration and internal quotation marks omitted)).

possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 129 S. Ct. at 1718. Thus, many lower courts permitted the police to engage in a full vehicle search even when the arrestee was handcuffed or had already left the scene. *Thornton*, 541 U.S. at 628; *Gant*, 129 S. Ct. at 1718 & nn.2-3.

Just two years ago, this Court in *Gant* stepped in to realign the *Belton* rule with its underlying justifications. In seeking to uphold a broad reading of *Belton*, the state argued that its "expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle." *Gant*, 129 S. Ct. at 1720. The Court disagreed. The state's analysis "seriously undervalues" the individual privacy concerns, the Court explained, and at the same time "exaggerates the clarity that its reading of *Belton* provides." *Id.* Observing that lower courts had split on several issues in applying *Belton*, the Court noted that the rule "has thus generated a great deal of uncertainty, particularly for a rule touted as providing a 'bright line.'" *Gant*, 129 S. Ct. at 1720-21.

Rather than the broad reading of *Belton* adopted by lower courts, the *Gant* Court concluded that "[t]o read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would . . . 'untether the rule from the justifications underlying the *Chimel* exception.'" 129 S. Ct. at 1719. After detailed analysis of the underlying justifications for the rule, the Court concluded that a search incident to arrest is allowed "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.*

This same series of events—this Court setting out a categorical authorization of specific police conduct, which then expanded over time in the lower courts until the scope of the rule became unmoored from its justifications—has been repeated time and again. For instance, lower courts applying the rule set out by the Court allowing a search incident to arrest, *see Chimel*, 395 U.S. at 763, extended this rule to uphold searches incident to a mere citation when the suspect was not taken into custody. In *Knowles v. Iowa*, 525 U.S. 113 (1998), this Court rejected the expansion of the rule as inconsistent with its underlying rationales. *Id.* at 114.

Similarly, this Court long ago suggested that officers could search a house if arresting one of its occupants. *E.g.*, *Agnello v. United States*, 269 U.S. 20, 30 (1925). Over time, however, lower courts began to expand the doctrine of search incident to arrest to justify the search of the inside of a house when an occupant of that house was arrested outside. That doctrinal expansion was restricted by this Court in *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). In *Vale*, the Court emphasized that the mere fact the police thought evidence might be inside the house was an insufficient basis for limiting Fourth Amendment rights. *Id.* at 33-34. The Court noted that the officers had been able to procure warrants for the arrest of the individual, and had information that he was resided at the address where they found him, and there was "thus no reason, so far as anything before us appears, to suppose that it was impracticable for them to obtain a search warrant as well." *Id.* at 35.

* * *

A conclusion that the *Summers* rule does not extend to those in the petitioner's situation would not mean that the police can never search an occupant who leaves the premises shortly before a search warrant is executed. The police have a substantial arsenal of tools available to ensure the detention of suspects when the facts justify it. *Cf. Chimel*, 395 U.S. at 764 n.9 (noting that rule limiting scope of categorical search does not exclude other potential justifications under Fourth Amendment for broader search). But when the facts do *not* justify detention, there should be no detention. Lower courts have too often failed to appreciate the boundaries of the *Summers* category—boundaries that are critical to minimizing the infringement on personal liberty a *Summers* detention represents. The Court should grants certiorari to reiterate those boundaries, and it should reverse the decision below to enforce them.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 19, 2012

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 3 - 2012
OFFICE OF THE CLERK

No. 11-770

In the Supreme Court of the United States

CHUNON L. BAILEY, A/K/A POLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: DECEMBER 16, 2011
CERTIORARI GRANTED: JUNE 4, 2012

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The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they appear as appendices to the petition for certiorari as follows:

Appendix A: Court of appeals opinion, July 6, 2011

Appendix B: Court of appeals order, September 20, 2011

Appendix C: District court order, September 6, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-3719-cr

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHUNON L. BAILEY, also known as POLO, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
8/29/07	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Chunon Bailey, filed. [Entry date Sep 6 2007] [KS]
	*****
1/30/08	Order FILED GRANTING motion hold appeal in abeyance by Appellant Chunon Bailey, endorsed on motion dated 1/16/2008. IT IS HEREBY ORDERED that the motion to hold the appeal in abeyance so that Appellant can file a 2255 petition in the District Court is GRANTED. Hon RKW CJJ. [Entry date Jan 30 2008] [RO]
	*****

3/3/10	Appellant Chunon Bailey motion to restore 07-3719 (direct appeal) and consolidate with 10-0398 appeal from order denying 2255.
	*****
7/20/10	BRIEF and SPECIAL APPENDIX, on behalf of Appellant Chunon L. Bailey, FILED. [Entry date Jul 21 2010] [CI]
7/20/10	APPENDIX, on behalf of Appellant Chunon L. Bailey, FILED. [Entry date Jul 21 2010] [CI]
	*****
11/17/10	BRIEF AND APPENDIX, on behalf of Appellee USA United States of America, FILED. [Entry date Nov 18 2010] [VC]
	*****
2/14/11	Case heard before: JAC, RSP, RR, C.JJ. [Entry date Feb 14 2011] [SC]
7/6/11	OPINION, affirming district court's judgment and order, by JAC, RSP, RR, FILED. [Entry date Jul 6 2011] [AG]
7/6/11	Judgment filed. [Entry date Jul 6 2011] [AG]
	*****
8/3/11	PETITION FOR REHEARING EN BANC, on behalf of Appellant Chunon Bailey, FILED. [Entry date Aug 5 2011] [AG]

*****

9/20/11	ORDER, denying petition for rehearing en banc filed by Appellant Chunon Bailey, FILED. [Entry date Sep 20 2011] [AG]
9/27/11	Judgment MANDATE ISSUED. CLOSED [Entry date Sep 27 2011] [AG]

*****

12/21/11	Notice of filing petition for APPELLANT Chunon Bailey, dated 12/20/2011 filed. Supreme Court #: 11-770. [Entry date Dec 22 2011] [AG]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Central Islip)

No. 2:06-cr-00232-JFB-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

CHUNON L. BAILEY, also known as POLO,
DEFENDANT

DOCKET ENTRIES

DATE	DKT. NO.	PROCEEDINGS
04/06/2006	1	INDICTMENT as to Chunon L. Bailey (1) count(s) 1, 2, 3. (Jackson, Ramona) (Entered: 04/12/2006)
		*****
06/07/2006	16	Notice of MOTION to Suppress and bifurcate with Declarations in Support by Chunon L. Bailey. (Attachments: #1 Exhibit A #2 Exhibit B #3 Exhibit C #4 Memorandum of Law) (Weil, Michael) (Entered: 06/07/2006)
		*****

07/10/2006	20	RESPONSE in Opposition Chunon L. Bailey re 16 Notice of MOTION to Suppress and bifurcate with Declarations in Support: Government's Memorandum of Law (Kelly, Charles) (Entered: 07/10/2006)
		*****
07/14/2006	22	REPLY TO RESPONSE to Motion Chunon L. Bailey re 16 Notice of MOTION to Suppress and bifurcate with Declarations in Support Letter to Judge (Conway, Joseph) (Entered: 07/14/2006)
		*****
08/02/2006	27	Calendar Entry for proceedings held on 8/2/06 at 2:00 p.m. before The Honorable Joseph F. Bianco, United States District Judge for Criminal Cause for Hearing; Appearances: Deft: Chunon Bailey, present, in custody with C.J.A. Counsel: Joseph Conway and Nancy Valery, present; For Govt.: A.U.S.A.: Charles Kelly; Deputy Clerk: Michele Savona; Court Reporter: O. Wicker. Case called. All counsel present. Conference held. Witnesses sworn. Argument heard. Decision: reserved. Deft continued in custody. (Fagan, Linda) (En-

		tered: 08/03/2006)
		*****
09/06/2006	29	MEMORANDUM AND ORDER. SEE ATTACHED MEMORANDUM AND ORDER denying defendant's motion to suppress. Ordered by Judge Joseph F. Bianco on 9/6/06. (Blanche, Todd) (Entered: 09/06/2006)
		*****
11/01/2006	43	Calendar Entry for proceedings held on 11/1/06 at 9:30 a.m. before The Honorable Joseph F. Bianco, United States District Judge, for Criminal Cause for Jury Trial; Appearances: Deft: Chunon Bailey, Deft. #:1, present, in custody, with CJA Counsel: Joseph Conway and Nancy Valary; For Govt.: A.U.S.A.: Charles Kelly and Manu Chadda; Deputy Clerk: Michele Savona; Court Reporter: Harry Rapaport. Case called. Deft appears with counsel. Jurors sworn and trial begins. Government opens. Deft opens. Jury trial held. Witnesses sworn: Daniel Fisher, Raheem Cannaday. Jury trial continued to 11/2/06 at 9:30 a.m. (Fagan, Linda) (Entered: 11/02/2006)

*****

11/02/2006	45	Calendar Entry for proceedings held on 11/2/06 at 9:30 a.m. before The Honorable Joseph F. Bianco, United States District Judge, for Criminal Cause for Jury Trial; Appearances: Deft.: Chunon Bailey, Deft. #:1, present, in custody, with CJA Counsel: Joseph Conway and Nancy Valary; For Govt.: A.U.S.A.: Charles Kelly and Manu Chadda; Deputy Clerk: Michele Savona; Court Reporter: Owen Wicker and Harry Rapaport. Case called. Deft appears with counsel. Jurors sworn and trial begins. Jury trial held. Jury trial resumes. Witnesses sworn: Raheem Cannaday, Richard Sneider; Jury trial cont'd. to 11/3/06 at 9:30 a.m. (Fagan, Linda) (Entered: 11/03/2006)
11/03/2006	49	Calendar Entry for proceedings held on 11/3/06 at 9:30 a.m. before The Honorable Joseph F. Bianco, United States District Judge, for Criminal Cause for Jury Trial; Appearances: Deft.: Chunon Bailey, Deft. #:1, present, in custody, with CJA Counsel: Joseph Conway and Nancy Valary, present; For Govt.: A.U.S.A.: Charles Kelly

and Manu Chadda; Deputy Clerk: Michele Savona; Reporter(s): Owen Wicker and Harry Rapaport. Case called. Deft appears with counsel. Jury sworn and trial begins. Jury trial held. Jury trial resumes. Witnesses sworn: Meltona Sykes, Bryant Middleton. Jury trial cont'd. to 11/6/06 at 9:30 a.m. (Fagan, Linda) (Entered: 11/06/2006)

*****

11/06/2006 50 Calendar Entry for proceedings held on 11/6/06 at 9:30 a.m. before The Honorable Joseph F. Bianco, United States District Judge, for Criminal Cause for Jury Trial; Appearances: Deft.: Chunon Bailey, Deft. #:1, present, in custody, with CJA Counsel: Joseph Conway and Nancy Valary, present; For Govt.: A.U.S.A.: Charles Kelly and Manu Chadda; Deputy Clerk: Michele Savona; Court Reporter: Mary Ann Steiger. Case called. Deft appears with counsel. Jurors sworn and trial begins. Jury trial held. Jury trial resumes. Jury trial cont'd. to 11/7/06 at 9:30 a.m. Govt summation. Deft summation. Govt rebuttal. Jury charged, alt's excused, USM sworn & delibera-

		tions begin. (Fagan, Linda) (Entered: 11/06/2006)
11/07/2006	56	Calendar Entry for proceedings held on 11/7/06 at 9:30 a.m. before The Honorable Joseph F. Bianco, United States District Judge, for Criminal Cause for/on Jury Trial; Appearances: Deft.: Chunon Bailey, Deft. #:1, present, in custody, with CJA Counsel: Joseph Conway and Nancy Valary, present; For Govt.: A.U.S.A.: Charles Kelly and Manu Chadda, present; Deputy Clerk: Carly Bellis; Court Reporter: Mary Ann Steiger. Case called. Deft appears with counsel. Jurors sworn and trial begins. Jury trial held. Jury trial resumed. Jury trial cont'd. to 11/8/06 at 9:30 a.m. Deliberations resume. (Fagan, Linda) (Entered: 11/09/2006)
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11/08/2006	57	Calendar Entry for proceedings held on 11/8/06 at 9:30 a.m. before The Honorable Joseph F. Bianco, United States District Judge, for Criminal Cause for/on Jury Trial; Appearances: Deft.: Chunon Bailey, Deft. #:1, present, in custody, with CJA Counsel: Joseph Conway and Nancy Valary; For Govt.:

		A.U.S.A.: Charles Kelly and Manu Chadda; Deputy Clerk: Carly Bellis; Court Reporter: Perry Auerbach. Case called. Deft appears with counsel. Jurors sworn and trial begins. Jury trial held. Jury trial resumes. Deliberations resume. GUILTY VERDICT on counts 1, 2 and 3. Jurors polled and excused. Sentencing set for 2/9/07 at 10:00 a.m. (Fagan, Linda) (Entered: 11/09/2006)
		*****
11/17/2006	86	JURY VERDICT as to Chunon L. Bailey (1) Guilty on Count 1, 2, 3. (Fagan, Linda) (Entered: 08/23/2007)
		*****
08/22/2007	84	Minute Entry for proceedings held before Joseph F. Bianco: Sentencing held on 8/22/2007 for Chunon L. Bailey (1), Count(s) 1, 300 months; Count(s) 2, 120 months to run concurrent with the term for count 1; Count(s) 3, 60 months to run consecutive with counts 1 and 2. Criminal Cause for sentencing held; deft present in custody with cja counsel Joseph Conway; AUSA Charles Kelly; case called; sentencing held; statements of deft

and counsel heard; The deft is sentenced to 360 months consisting of the following: 300 months on count 1, 120 months on count 2 to run concurrent with the term for count 1 and 60 months on count 3 to run consecutive with counts 1 and 2; Supervised release of 5 years to follow Special Conditions of Supervised Release: 1. deft shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. 2. deft shall participate in an outpatient and/or inpatient drug treatment or detoxification program approved by the Probation Dept. The deft shall pay the cost of such treatment/detoxification to the degree he is reasonable able, and shall cooperate in securing any applicable third-party payment. The deft shall disclose all financial information and documents to the Probation Dept to assess his ability to pay. The deft shall not consume any alcohol or other intoxicants during and after treatment/detoxification, unless granted a prescription by a licensed physician and proof of same is provided to the Probation dept. The deft shall submit to testing during and after treatment to ensure absti-

nence from drugs and alcohol. 3. The deft shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found; the search must also be conducted in a reasonable manner and at a reasonable time; failure to submit to a search may be grounds for revocation; the deft shall inform any other residents that premises may be subject to search pursuant to this condition. The court makes the following recommendation to the Bureau of Prisons: Deft be allowed to participate in a substance abuse treatment program consistent with Bureau of Prison regulations. That the deft. be given credit for time served in state custody on charges arising from the instant offense. FINE: the fine is waived based on the defts inability to pay; Special Assessment is imposed in the sum of $300.00. The deft. is advised of his right to appeal (Court Reporter Paul Lombardi.) (Bollbach, Jean) (Entered: 08/23/2007)

08/22/2007	85	JUDGMENT as to Chunon L. Bailey (1), Count(s) 1, 300 months; Count(s) 2, 120 months to run concurrent with the term for count 1; Count(s) 3, 60 months to run consecutive with counts 1 and 2 — Supervised release of 5 years to follow Special Conditions of Supervised Release: 1. deft shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. 2. deft shall participate in an outpatient and/or inpatient drug treatment or detoxification program approved by the Probation Dept. The deft shall pay the cost of such treatment/detoxification to the degree he is reasonable able, and shall cooperate in securing any applicable third-party payment. The deft shall disclose all financial information and documents to the Probation Dept to assess his ability to pay. The deft shall not consume any alcohol or other intoxicants during and after treatment/detoxification, unless granted a prescription by a licensed physician and proof of same is provided to the Probation dept. The deft shall submit to testing during and after treatment to ensure abstinence from drugs and alco-

hol. 3. The deft shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found; the search must also be conducted in a reasonable manner and at a reasonable time; failure to submit to s search may be grounds for revocation; the deft shall inform any other residents that premises may be subject to search pursuant to this condition. The court makes the following recommendation to the Bureau of Prisons: Deft be allowed to participate in a substance abuse treatment program consistent with Bureau of Prison regulations. That the deft. be given credit for time served in state custody on charges arising from the instant offense. FINE: the fine is waived based on the defts inability to pay; Special Assessment is imposed in the sum of $300.00. The deft. is advised of his right to appeal (Court Reporter Paul Lombardi.) (Bollbach, Jean) (Entered: 08/23/2007). Ordered by Judge Joseph

		F. Bianco on 8/22/07. (Bollbach, Jean) (Entered: 08/23/2007)
		*****
08/29/2007	89	NOTICE OF APPEAL by Chunon L. Bailey re 85 Judgment, (McMahon, Carol) (Entered: 08/29/2007)
		*****
01/28/2010	109	NOTICE OF APPEAL by Chunon L. Bailey (Tipograph, Susan) (Entered: 01/28/2010)

SEARCH WARRANT

STATE OF NEW YORK)
) SS:
COUNTY OF SUFFOLK)

First District Court
Town of Islip

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any Police Officer of the Suffolk County Police Department:

Proof, by affidavit, having been this day made before me, by Detective Richard Sneider, Shield No. 841, that there is probable cause for believing that certain property:

is unlawfully possessed;

has been used to commit an offense against the laws of this state or another state;

has been used to conceal the commission of an offense against the laws of this state or another state;

is possessed for the purpose of being used to commit an offense against the laws of this state or another state;

is possessed for the purpose of being used to conceal the commission of an offense against the laws of this state or another state;

constitutes evidence that an offense was committed in this state or another state;

tends to demonstrate that an offense was committed in this state or another state;

constitutes evidence that a particular person participated in the commission of an offense in this state or another state;

tends to demonstrate that a particular person participated in the commission of an offense in this state or another state.

YOU ARE, THEREFORE, COMMANDED, at any time of the day or night without giving notice of your authority, to make a search of the basement apartment of 103 Lake Drive, Wyandanch, Suffolk County, New York. 103 Lake Drive, Wyandanch is a two story Tudor style house with a tan stucco front, a white roof, white storm door, a wooden porch with a railing and a "103" on the mailbox on the curb. The premise has a wood fence with a gate to the rear and is located on the north side of Lake Drive. The entrance to the basement apartment is located at the rear of the premises. 103 Lake Drive, Wyandanch is believed to be occupied by an individual known as "Polo", a heavy set black male with short hair, and other persons unknown, for the following property:

A chrome .380 handgun, ammunition, magazine clips, and any indicia of ownership of said handgun, including but not limited to receipts, operators manuals, or other papers or photographs indicating ownership, knowledge or control.

And if you find the same or any part thereof, to bring it before me, without any unnecessary delay, at my office in the Town of Islip, County of Suffolk, New York. Dated at the said Town of Islip, County of Suffolk, New York, the 28th day of July, 2005.

SWORN STATEMENT AND CRIMINAL HISTORY OF THE INFORMANT TO BE SEALED

/s/

Title

/s/

(Title of Judge)

20:45

Time Signed

STATE OF NEW YORK
COUNTY OF SUFFOLK

First District Court
Town of Islip

APPLICATION AND AFFIDAVIT
FOR
SEARCH WARRANT

In the Matter of

The Application of Detective Richard Sneider, Shield No. 841, for a warrant authorizing the search of:

(1) of the basement apartment of 103 Lake Drive, Wyandanch, Suffolk County, New York. 103 Lake Drive, Wyandanch is a two story Tudor style house with a tan stucco front, a white roof, white storm door, a wooden porch with a railing and a "103" on the mailbox on the curb. The premise has a wood fence with a gate to the rear and is located on the north side of Lake Drive. The entrance to the basement apartment in located at the rear of the premises. 103 Lake Drive, Wyandanch is believed to be occupied by an individual know as "Polo", a heavy set black male with short hair, and other persons unknown,

(2) for certain property which is unlawfully possessed; has been used to commit an offense against the laws of this state or another state; has been used to conceal the commission of an offense against the laws of this state or another state; is possessed for the purpose of being used to commit an offense against the laws of this state or another state; is possessed for the purpose of being used to conceal the

commission of an offense against the laws of this state or another state; constitutes evidence that an offense was committed in this state or another state; tends to demonstrate that an offense was committed in this state or another state; constitutes evidence that a particular person participated in the commission of an offense in this state or another state; tends to demonstrate that a particular person participated in the commission of an offense in this state or another state; to wit,

A chrome .380 handgun, ammunition, magazine clips, and any indicia of ownership of said handgun, including but not limited to receipts, operators manuals, or other papers or photographs indicating ownership, knowledge or control.

STATE OF NEW YORK)
) SS:
COUNTY OF SUFFOLK)

Detective Richard Sneider, Shield No. 841, being duly sworn, deposes and says

(3) I am a Detective employed by the Suffolk County Police Department and I am currently assigned to the Suffolk County Police Department's First Precinct NE/SOT Team (Narcotics Enforcement Special Operations Team). I have been a Police Officer for 23 years and a Detective for the past 17 years. During that time, I have participated in numerous investigations and arrests involving gun related assaults, reckless endangerment and possession of illegal handguns. During the course of my employment as a Suffolk County Police Officer I have

received instruction and supervision from superior officers, in addition to my formal training in the Suffolk County Police Academy, in the investigation of gun related assaults, reckless endangerment charges and possession of handguns.

(4) I have information based upon personal knowledge and information and belief, the source being the attached sworn statement of a confidential informant that there is a handgun located in the basement apartment of 103 Lake Drive, Wyandanch, Suffolk County, New York. 103 Lake Drive, Wyandanch is a two story Tudor style house with a tan stucco front, a white roof, white storm door, a wooden porch with a railing and a "103" on the mailbox on the curb. The premise has a wood fence with a gate to the rear and is located on the north side of Lake Drive. The entrance to the basement apartment is located at the rear of the premises. 103 Lake Drive, Wyandanch is believed to be occupied by an individual know as "Polo", a heavy set black male with short hair, and other persons unknown.

This application is based in part on the attached sworn statement of a confidential informant (see attached sworn statement). Your deponent asks that this statement be deemed a part of this application as if it were recited in its entirety at this point. It has not been thoroughly recited in order to protect the informant. In addition, your deponent asks that the statement of this informant be sealed for the protection of the informant and to protect the integrity of this investigation. For additional specifics, your deponent asks the Magistrate to refer to the attached sealed statement of the confidential informant.

The confidential informant has prior misdemeanor and felony convictions. In addition, the confidential informant has a pending misdemeanor and violation charge in Suffolk County. No promises were given to this individual in exchange for his/her cooperation other than the Suffolk County District Attorney's Office would be advised of the confidential informant's cooperation. A copy of the confidential informant's criminal history is attached for review. Your deponent requests that the criminal history of the informant to be sealed for the protection of the informant and to protect the integrity of this investigation. Your deponent asks the Magistrate to refer to the attached sealed criminal history of the confidential informant.

The confidential informant has previously provided information to members of the Suffolk County Police Department. Based on the confidential informant's information, members of the Suffolk County Police Department arrested individuals for Criminal Sale of a Firearm in the Third Degree and Criminal Possession of a Weapon in the Third Degree.

Based upon your deponent's experience, training and investigation into this matter, there is probable cause to believe that a handgun will be found at the above-described premises.

Based upon your deponent's investigation into this matter there is at least one handgun in this residence. Handguns are deadly weapons. As such, they pose a serious threat to officer's safety. For these reasons, your deponent requests permission to execute this warrant without first giving notice of authority or purpose. For the same reasons listed above, as well as the fact that it is unclear the exact

number of occupants at the location, your deponent seeks permission to enter the location at any time of the day or night.

Based upon your deponent's experience and training, handguns can be easily concealed and/or transported. In order to prevent delay, which could result in the movement, concealment or the destruction of evidence, your deponent is applying for a warrant to search these premises at any hour of the day or night.

Based on your deponent's experience and training, possessors of illegal weapons also possess ammunition for said weapon and magazine clips to hold the ammunition. In addition your deponent requests permission to search for any evidence to indicate ownership of said handgun, ammunition and magazine clips. Therefore your deponent seeks permission also to search for any ammunition and/or magazine clips for the aforementioned .380 caliber handgun as well as any evidence to show ownership of the weapon and ammunition.

(5) Based upon the foregoing reliable information and upon my investigation, there is probable cause to believe that such property, to wit, A chrome .380 handgun, ammunition, magazine clips, and any indicia of ownership of said handgun, including but not limited to receipts, operators manuals, or other papers or photographs indicating ownership, knowledge or control.

is unlawfully possessed;

has been used to commit an offense against the laws of this state or another state;

has been used to conceal the commission of an offense against the laws of this state or another state;

is possessed for the purpose of being used to commit an offense against the laws of this state or another state;

is possessed for the purpose of being used to conceal the commission of an offense against the laws of this state or another state;

constitutes evidence that an offense was committed in this state or another state;

tends to demonstrate that an offense was committed in this state or another state;

constitutes evidence that a particular person participated in the commission of an offense in this state or another state;

tends to demonstrate that a particular person participated in the commission of an offense in this state or another state.

and may be found in,

(6) the basement apartment of 103 Lake Drive, Wyandanch, Suffolk County, New York. 103 Lake Drive, Wyandanch is a two story Tudor style house with a tan stucco front, a white roof, white storm door, a wooden porch with a railing and a "103" on the mailbox on the curb. The premise has a wood fence with a gate to the rear and is located on the north side of Lake Drive. The entrance to the basement apartment is located at the rear of the premises. 103 Lake Drive, Wyandanch is believed to be occupied by an individual known as "Polo", a heavy set black male with short hair, and other persons unknown.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of said premises,

And directing that if such property or evidence or any part thereof be found, that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No other application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

/s/

Detective Richard Sneider
Shield No. 841

Sworn to before me, this
28th day of July, 2005.

/s/

District Court Judge

POLICE DEPARTMENT COUNTY OF SUFFOLK, N.Y.
STATEMENT FORM

[redacted] (being duly sworn) deposes and says:

(words "being duly sworn" are to be crossed out if a sworn statement is not being prepared) that I am [redacted] years old.

I was born on [redacted]. I am giving this statement to Det. R. Sneider 841/[illegible]/4.
(name of officer)

I am giving this statement freely, having received no threats or promises to do so.

This past weekend, either Saturday or Sunday night, at about 9 PM I went over to 103 Lake Drive in Wyandanch to buy 6 grams of crack/cocaine from a guy I know as "Polo" who lives in a basement apartment there. I went around to the back door & into Polo's apartment where he lives alone. He sold me 6 grams of crack & while I was there I saw his chrome .380 caliber handgun on the kitchen counter with the drugs. I also had seen it there before when I bought drugs from him. He used to live in Bay Shore & when he lived there he always had the same gun there. I would describe Polo as a dark skinned black male, heavyset with short hair. The detectives took me for a ride & I pointed out the house where Polo lives. I have known Polo for about 2 months. I have bought crack from him about 7 or 8 times. I have read this statement consisting of 1 page & swear that it is all true.

Signature of person giving statement
[redacted] 7-28-2005

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CR 06-232

UNITED STATES OF AMERICA

v.

CHUNON L. BAILEY, also known as POLO,
Defendant

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE
(Possession with Intent to
Distribute Cocaine Base)

On or about July 28, 2005, within the Eastern District of New York, the defendant CHUNON L. BAILEY, also known as "Polo," did knowingly and intentionally possess with intent to distribute a controlled substance, which offense involved 5 grams or more of a substance containing cocaine base, a Schedule II controlled substance.

(Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(iii); Title 18, United States Code, Sections 2 and 3551 *et seq.*)

COUNT TWO
(Felon-in-Possession of Firearms)

On or about July 28, 2005, within the Eastern District of New York, the defendant CHUNON L. BAI-

LEY, also known as "Polo," having been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, did knowingly and intentionally possess in and affecting commerce one or more firearms, to wit: a Bryco Arms 9mm Jennings semi-automatic pistol, a Haskell Hi-Point .45 caliber semi-automatic pistol and a Hi-Point Model 995 semi-automatic rifle.

(Title 18, United States Code, Section 922(g)(1), 924(a)(2) and 3551 *et seq.*)

COUNT THREE
(Possessing A Firearm In Furtherance of A Drug Trafficking Crime)

On or about July 28, 2005, within the Eastern District of New York, the defendant CHUNON L. BAILEY, also known as "Polo," together with others, did knowingly and intentionally use and carry firearms, to wit: the firearms listed in Counts Two ~~through Four~~,[BC] during and in relation to a drug trafficking crime, to wit: the crime charged in Count One, and did knowingly and intentionally possess said firearms in furtherance of said drug trafficking crime.

(Title 18, United States Code, Sections 924(c)(1)(A)(i), 2 and 3551 *et seq.*)

A TRUE BILL

/s/

FOREPERSON

/s/

ROSLYNN R. MAUSKOPF
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

[EXHIBIT TO NOTICE OF MOTION TO SUPPRESS]

7-28-05 Det. Sneider & Gorbecki

2156 hrs. — while on surv. of 103 Lake Dr., Wyand, observed 2 subjects leave from the rear of 103 & get into a black Lexus in the driveway. Followed same.

2201 — Stopped vehicle on N 18 St just west of Straight Path in the rear of the Wyand. Fire Dep't.

Driver — Bailey, Chunon L 11-9-74

Passenger — Middleton, Bryant W 7-30-68

Asked driver where he was coming from & he responded "my house"

Asked where his house was & he stated 103 Lake Drive

Asked passenger where he lives & he said right up the block. Said the driver was taking him home.

Driver was then told that we were executing a search warrant at his apartment & he stated "I'm not cooperating with this & I don't live there." "Whatever you find there ain't mine."

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CR 06-232

UNITED STATES OF AMERICA

v.

CHUNON BAILEY, Defendant

August 2, 2006
2:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	ROSLYNN MAUSKOPF United States Attorney 100 Federal Plaza Central Islip, N.Y. 11722 By: CHARLES P. KELLY, ESQ. Assistant U.S. Attorney
For the Defendant:	NANCY VALERY, ESQ. JOSEPH CONWAY, ESQ.
Court Reporter:	Owen M. Wicker, R.P.R. 100 Federal Plaza Central Islip, NY 11722 (631) 712-6102

[2]

(Case called.)

MR. KELLY:

For the government, Assistant United States Attorney Charles P. Kelly.

Good afternoon, your Honor.

THE COURT:

Good afternoon, Mr. Kelly.

MS. VALERY:

Good afternoon. For the defendant Chunon Bailey, Nancy Valery and Joseph Conway of Conway and LaRusso.

THE COURT:

As you know, I set this down for a hearing on the defendant's motion to suppress the key and the statements by the defendant pursuant to the car stop.

Is the government ready to proceed?

MR. KELLY:

Yes, your Honor.

THE COURT:

I appreciate counsel rescheduling this for today as opposed to tomorrow.

Before we proceed with the hearing, let me make sure I understand the defendant's arguments. And we discussed this during oral argument as well. I went back and looked at the moving papers.

The moving papers essentially say the stop was improper and therefore everything that comes after

it should be suppressed. During the oral argument, we got into a discussion about even if the stop were valid, that defendant should have been Mirandized pursuant to that stop.

[3]

Is that a subargument being made? Because that wasn't specifically made in the moving papers. And I understand you weren't counsel at the time of those moving papers, but is that a subargument you are making as well?

MS. VALERY:

Yes, we are arguing our position, essentially, that there was no probable cause or any reason for the stop in the first place. However, even if there was, it was a statement made in violation of Miranda, in addition to the key should be suppressed in violation of the pat-down frisk cases.

THE COURT:

And you are not only seeking to suppress the statement that was made after the defendant was told of the execution of the search; you are seeking the first statement given about who he is and his address.

MS. VALERY:

Yes, your Honor, we are seeking all the things made by the defendant at the time of the stop, right after the stop was conducted.

THE COURT:

Thank you.

Okay, Mr. Kelly, you may proceed.

MR. KELLY:

Your Honor didn't want openings, did you?

THE COURT:

No.

MR. KELLY:

The government calls Richard Gorbecki.

At the table with me is the acting case agent [4] also, Richard Sneider, who will be a witness.

THE COURT:

Okay.

RICHARD GORBECKI,

called as a witness, having been first duly sworn, was examined and testified as follows:

THE WITNESS:

Detective Richard Gorbecki, G-O-R-B-E-C-K-I.

MR. KELLY:

May I inquire, Judge?

THE COURT:

Yes.

DIRECT EXAMINATION

BY MR. KELLY:

Q. Good afternoon.

A. Good afternoon.

Q. Where are you employed?

A. I'm employed with the Suffolk County Police Department.

Q. How long have you been employed there?

A. Since April of 1987.

Q. And what is your current position?

A. I'm a detective assigned to the first squad, narcotics enforcement, special operations team.

Q. And was that your position on July 28, 2005?

A. Yes, it was.

Q. And what are your duties and your responsibilities in [5] connection with that position?

A. Our primary duties are to investigate the illegal sale and possession of narcotics and weapons in the first precinct area.

Q. And what area does that cover?

A. The Town of Babylon.

Q. Now on July 28, 2005, were you on duty?

A. Yes, I was.

Q. And in the evening of that day, did you have duties relating to 103 Lake Drive in Wyandanch, New York?

A. Yes, I did.

Q. And could you tell the Court what those duties were in relation to that address?

A. My duties were to conduct presearch warrant surveillance on the residence that a search warrant was being obtained for.

Q. At of the time you were doing this, approximately when did you start your presurveillance?

A. It was approximately 8:30 p.m. on that evening.

Q. And what information did you have, and in what area were you watching in connection with that residence?

A. Specifically the rear basement apartment of 103 Lake Drive, and that the warrant that was being requested was for weapons at that location.

Q. And were you told anything in regard to what part of [6] the house to watch?

A. Yes, there was a gated section. If you looked at the house, it was to the right of the residence. That gate led to a basement apartment which was around the rear of that residence.

MR. KELLY:

May I approach the witness, your Honor?

THE COURT:

Yes.

BY MR. KELLY:

Q. Showing you Government's Exhibit 3, which is Bates number 79, do you recognize what is portrayed in that picture?

A. Yes, I do.

Q. What is that?

A. This is the overall front of 103 Lake Drive, a photograph of the front of.

Q. Does that fairly and accurately portray it as it appeared on that evening?

A. Yes it does.

MR. KELLY:

We offer Government's Exhibit 3 into evidence, your Honor.

THE COURT:

Any objection?

MS. VALERY:

No objection.

THE COURT:

Government 3 admitted.

(Whereupon, Government Exhibit 3 was received in [7] evidence.)

BY MR. KELLY:

Q. Showing you Government's Exhibit 4, do you recognize the scene portrayed in that photograph, Bates number 78?

A. Yes, I do.

Q. What is that?

A. This is the doorway at the bottom of the stairs that leads in the rear apartment at 103 Lake Drive.

Q. Does that fairly and accurately portray the area during or after the search of July 25, 2005?

A. Yes, it does.

MR. KELLY:

The government offers Exhibit 4 in evidence, your Honor.

MS. VALERY:

No objection.

THE COURT:

Government's Exhibit 4 is admitted.

(Whereupon, Government Exhibit 4 was received in evidence.)

BY MR. KELLY:

Q. Showing you Government's Exhibit 5, do you recognize the scene portrayed in that photograph?

A. Yes, I do.

Q. And what is that?

A. This is 103 Lake Drive.

Q. As it existed that night or as it exists today?

A. As it exists today.

[8]

MR. KELLY:

The government offers Exhibit 5 into evidence your Honor.

MS. VALERY:

No objection.

THE COURT:

Government's Exhibit 5 is admitted.

(Whereupon, Government Exhibit 5 was received in evidence.)

BY MR. KELLY:

Q. Showing you Government's Exhibit 6 for identification, do you recognize the scene portrayed in that photograph?

A. Yes, I do.

Q. And what is that?

A. This is the side gate area on the right side of the house at 103 Lake Drive.

Q. Does that fairly and accurately portray the side gate area in any way as it existed on July 28, 2005?

A. Yes.

Q. Okay.

The house as it existed in this photograph, is that the house as it existed then or is it —

A. The house as it exists currently.

Q. As it exists currently.

And showing you this —

THE COURT:

I'm sorry, the house as it exists currently?

[9]

MR. KELLY:

Yes.

BY MR. KELLY:

Q. But does it fairly and accurately portray the gate area, the fencing that was there on the night of July 28, 2005?

A. Yes, it does.

MR. KELLY:

The government offers Exhibit 6 in evidence, your Honor.

THE COURT:

Any objection?

MS. VALERY:

If I may just look at that exhibit.

MR. KELLY:

(Handing.)

MS. VALERY:

No objection.

No objection.

THE COURT:

Government's Exhibit 6 is admitted.

(Whereupon, Government Exhibit 6 was received in evidence.)

BY MR. KELLY:

Q. Showing you Exhibit 7, do you recognize that exhibit?

A. Yes.

Q. What does that portray?

A. This is the fenced-in portion of the apartment, the stairs leading down to the apartment at the rear of 103 Lake Drive.

Q. Does that fairly and accurately portray the fenced-in portion of the top of the stairs as it existed on July 28, [10] 2005?

A. Yes, it does.

MR. KELLY:

The government offers Exhibit 7 into evidence, your Honor.

MS. VALERY:

No objection.

THE COURT:

Government's Exhibit 7 is admitted.

(Whereupon, Government Exhibit 7 was received in evidence.)

BY MR. KELLY:

Q. Showing you Exhibit 8, do you recognize the scene portrayed in that photograph?

A. Yes, I do.

Q. What is that?

A. This is the hinged portion of where the gate was that led to the basement apartment at 103 Lake Drive.

Q. It fairly and accurately portrays the hinges as it existed on July 28, 2005?

A. Yes, it does.

MR. KELLY:

The government offers Exhibit 8 in evidence.

MS. VALERY:

No objection.

THE COURT:

Government's Exhibit 8 admitted.

(Whereupon, Government Exhibit 8 was received in evidence.)

BY MR. KELLY:

[11]

Q. Showing you Government's Exhibit 9 for identification, do you recognize the scene portrayed?

A. Yes.

Q. What is that?

A. It's the fenced-in portion of the apartment area and the rear of 103 Lake Drive.

MR. KELLY:

The government offers Exhibit 9 into evidence, your Honor.

MS. VALERY:

No objection.

THE COURT:

Government's Exhibit 9 is admitted.

(Whereupon, Government's Exhibit 9 was received in evidence.)

BY MR. KELLY:

Q. Exhibit 10. Do you recognize the scene portrayed in that photograph?

A. Yes, I do.

Q. What is that?

A. This is a portion of the stairs leading to the basement apartment at 103 Lake Drive.

Q. Does it show the top of the stairs as it existed on July 28, 2005?

A. Other than the siding on the house, yes.

Q. Yes, but the top of the stairs is the way you recall it on July 28, 2005?

A. Yes, that is correct.

[12]

MR. KELLY:

I offer Exhibit 10, your Honor.

MS. VALERY:

No objection.

THE COURT:

Government's Exhibit 10 is admitted.

(Whereupon, Government Exhibit 10 was received in evidence.)

THE COURT:

By the way, I just want to interrupt for a minute. I don't know who will conduct the cross-examination in connection with the witnesses or who is putting on other witnesses, but obviously Mr. Conway is here as well as Ms. Valery, and Mr. Conway is your appointed attorney. Ms. Valery, as I told you last week, works with him.

Are you okay with her participating in this hearing on your behalf?

THE DEFENDANT:

Yes, I am.

THE COURT:

Okay. Thank you.

BY MR. KELLY:

Q. Showing you Exhibit 11, do you recognize the scene portrayed in that?

A. Yes.

Q. What is that?

A. This is the doorway on the — at the bottom of the stair going into the apartment at the rear of 103 Lake Drive.

Q. Does that fair and accurately portray the stairs as [13] it led down to the stair door landing on July 28, 2005?

A. Yes, it does.

MR. KELLY:

The government offers Exhibit 11.

MS. VALERY:

No objection, your Honor.

THE COURT:

Government's Exhibit 11 is admitted.

(Whereupon, Government Exhibit 11 was received in evidence.)

BY MR. KELLY:

Q. Approximately how large is the area that you talked about as being the fenced-in area, the gated area that enclosed the top of the stairs that led down to the basement apartment? Approximately how long or how large was that area?

A. Four by six, approximately.

Q. Four feet by six feet?

A. Four feet by six feet.

Q. That is what was between the gate. And when you opened the gate and you went to the top of the stairs, there was an area of about four feet by six feet at the top of the stairs?

A. Approximately, yes.

Q. Was that area — was the backyard accessible from there or was that fenced in from the backyard?

A. It was completely separated area from the backyard. You couldn't enter the backyard from that fenced area.

[14]

Q. Now, did there come a time that night when you were doing presurveillance when you were told that a warrant had been obtained?

A. I'm sorry?

Q. Did there come a time that night when you were told that a search warrant had been obtained?

A. Yes, there did.

MR. KELLY:

May I approach, your Honor?

THE COURT:

Yes.

BY MR. KELLY:

Q. Showing you Exhibit 1 for identification, do you recognize that (handing)?

A. Yes, I do.

Q. What is that?

A. That's the search warrant for 103 Lake Drive.

MR. KELLY:

The government offers Exhibit 1, the search warrant, into evidence, your Honor.

MS. VALERY:

No objection.

THE COURT:

Government's Exhibit 1 is admitted.

(Whereupon, Government Exhibit 1 was received in evidence.)

BY MR. KELLY:

Q. Now, did there come a time that evening when you saw people exiting the gate that was in front of the area at the top of the stairs to the basement apartment?

[15]

A. Yes, there did.

Q. And was that after the search warrant had been obtained?

A. Yes, it was.

Q. And approximately when was that that you saw people exiting the gated area?

A. It was approximately 9:56 p.m. that evening.

Q. And was it your understanding at that point that the only place you could be coming from when you come out from the gate is the basement apartment?

MS. VALERY:

Objection. Leading.

THE COURT:

Overruled.

A. That's correct.

BY MR. KELLY:

Q. Can you describe the two people you saw exiting the gate?

A. Both males were black, stocky build and short hair, approximately six foot tall.

Q. In connection with the search warrant, did you have a description of the person who was believed to be — the search warrant was for a gun. Did you have a description of the person?

A. Yes.

Q. What was the description you had?

A. He was a black male with a stocky build who was [16] approximately six foot tall, with short hair.

Q. So after you saw — when you saw these two people exit the gate, where were you?

A. We were in the street in front of that residence, approximately 30 yards or so to the east.

Q. When you say "we," who are you referring to?

A. Myself and Detective Sneider.

Q. Richard Sneider?

A. That's correct.

Q. You were in a marked or unmarked vehicle?

A. We were in an unmarked vehicle.

Q. And what happened next?

A. We followed the vehicle with the two — I'm sorry, the two subjects had existed the gate, got into a vehicle and left that residence.

Q. What kind of vehicle was that?

A. It was a black Lexus.

Q. Where was that parked, on the street or in the driveway?

A. That was in the driveway of 103 Lake Drive.

Q. What happened after they left the driveway? What did you proceed to do?

A. We followed them away from the location.

Q. And why did you follow them?

A. To identify them and see what their purpose was for [17] being at the residence.

Q. And did you pull them over immediately after they pulled away from the house?

A. No, we did not.

Q. What did you do?

A. We followed them to a location on South 18th Street in Wyandanch and made the vehicle stop.

Q. When they pulled away, did you follow them right away or did you wait?

A. We waited a short period of time and let them leave the immediate area.

Q. And when you did follow them, did you have headlights on?

A. At first, no, we did not.

Q. And where did you follow them to?

You followed them from 103 Lake Drive. Tell the Court where you followed them to.

A. We followed them down — we continued on Lake Drive up to Mount Avenue, which is also in Wyandanch. They made a right turn on Mount Avenue, where they went to Straight Path. Proceeded north on Straight Path approximately two blocks to South 18th Street, where they made a left turn.

Q. Is that where you pulled them over?

A. Yes, we pulled them over on South 18th Street just to the north, I guess the north or the west of Straight Path.

[18]

Comes in on an angle.

Q. Approximately how long did you follow them?

A. Less than five minutes.

Q. Approximately how far did you follow them for?

A. I would say it was approximately a mile, maybe a little less.

Q. And why did you follow them away from the scene rather than pulling them over at the scene?

A. As a safety issue for everybody involved in the investigation.

Q. What do you mean by "everybody involved in the investigation"? Who do you mean?

A. Just in case there are other people still inside the residence where we'll be executing the warrant, we don't want them to see we pulled over somebody at the house.

And we'll have an entry team that will be going into the house in a few minutes. We don't want the people inside the house to know that the people who just left were stopped by the police, because if there are weapons there, they could arm themselves or they could destroy some of the evidence that we're searching for.

Q. The area where you pulled them over, was that a residential street, or what was on that street where you pulled them over?

A. There were no residences on the street. There's, I [19] believe, a fish market on the corner. There's a fire department. And there's some sort of an auto — I don't know if it is a salvage yard or an auto body shop.

Q. Was it well lit at the time you pulled them over?

A. Yes.

Q. At the time you pulled them over, it was nighttime, dark out?

A. Yes.

Q. Did you consider this to be a safe place to pull them over?

A. Yes, it was.

Q. And were there traffic — as you followed them, were there traffic lights on the way?

A. Yes.

Q. How many?

A. There are two traffic lights.

Q. Please tell the Court, once you pulled them over, once you pulled that vehicle over —

THE COURT:

May I stop you for a minute and ask you to explain a little bit more to me why you chose that spot as opposed to some spot in between when you got to the residence?

THE WITNESS:

Yes. We wanted them to get off of Lake Drive. Basically didn't want the neighbors to see us or anybody at that location to pass us while we have the [20] car stopped and arrived at the location.

By the time we actually caught up to the vehicle, he was already at Mount Avenue, a very short block off of Straight Path, a pretty busy intersection. And before we even reached him, he was able to get out off Straight Path and go northbound.

Our option was he get off Straight Path, which is a busy road, and as soon as he did so, we did pull him over.

THE COURT:

Thank you.

MR. KELLY:

May I approach, Judge?

THE COURT:

Yes.

BY MR. KELLY:

Q. Showing you Exhibit 2, do you recognize the drawing on that map?

A. Yes, I do.

Q. And what is that?

A. This is the route that we took when we followed the vehicle that left 103 Lake Drive.

Q. And the writing, the green highlighting, that accurately portrays the route you took in following the vehicle from 103 Lake Drive to where you pulled it over?

A. Yes, it does.

Q. Does the yellow mark indicate 103 Lake Drive when you began to follow them?

[21]

A. Yes, it does.

MS. VALERY:

No objection.

MR. KELLY:

The government offers Exhibit 2.

THE COURT:

Government's Exhibit 2 is admitted.

(Whereupon, Government Exhibit 2 was received in evidence.)

BY MR. KELLY:

Q. After —

MR. KELLY:

Would it assist the Court if I hand those up now?

THE COURT:

Yes. Thank you.

Could you just hold on one minute, Mr. Kelly?

MR. KELLY:

Yes, your Honor.

BY MR. KELLY:

Q. After you pulled him over, Detective, what happened next?

A. Myself and Detective Sneider approached their vehicle.

Q. And what side did you go to and what side did he go to of the vehicle that had been pulled over?

A. Detective Sneider approached the driver's side of the vehicle, and I approached the passenger's side of that vehicle.

Q. And what was said after you got to the vehicle?

A. I had overheard Detective Sneider tell the operator [22] of the vehicle to please turn the vehicle off.

Q. And what happened next? Did you say something or —

A. I had asked the passenger of the vehicle to exit the vehicle and come to the rear of the car, rear of their vehicle.

Q. Why did you ask him to exit the car at that time, the passenger of the vehicle?

A. The warrant that was obtained for 103 Lake Drive was the warrant for a weapon, and we weren't sure if the individuals, who had left the house, possibly had that weapon or a weapon on them. So we'd like to remove them from the vehicle.

Q. You were concerned about your personal safety at that time?

A. Yes, I was.

Q. And did the passenger of the vehicle comply with your directions and exit the vehicle and go to the rear of the vehicle?

A. Yes, he did.

Q. And tell us about the driver of the vehicle. Was he given a similar directive?

A. I believe that Detective Sneider also told him to come to the rear of the vehicle also.

Q. And at the rear of the vehicle, what happened next?

A. We conducted a pat-down of both individuals that were [23] inside that vehicle.

Q. And why did you conduct a pat-down at that time?

A. To check for weapons.

Q. And at that time, it was your belief that they had just left the residence where a search warrant was about to be executed, a search warrant having been signed, and it was for guns; is that correct?

A. That's correct.

Q. All right. You did a pat-down search.

Was anything taken at that point — you were patting down the passenger?

A. Yes.

Q. And had he identified himself to you?

A. Yes.

Q. Who did he say he was?

A. He said he was Bryant Middleton.

Q. And did you ask him any other questions?

A. Yes, I did.

Q. What did you ask him?

A. I asked him where he lived, where he was coming from —

Q. What did he say?

A. — things of that.

He said coming from his friend's house at 103 Lake Drive, and he was on his way home to 44 South [24] 18th Street in Wyandanch.

Q. And did he indicate who the friend was he was referring to?

A. Yes, he did.

Q. Who?

A. Chunon Bailey.

Q. Who was — that was the driver of the vehicle?

A. Yes, he was.

Q. And did Middleton say anything else to you at that time, Mr. Middleton?

A. Yes. He told me that he was on parole and that he had a 10 o'clock curfew, and Mr. Bailey was driving him home for that curfew.

Q. And did you hear anything that Detective Sneider said to Mr. Bailey, or did you see him take any property from him?

A. Uhm, I believe there was some property up on the trunk, up on the vehicle. I don't know if Detective Sneider actually removed it or Mr. Bailey actually removed it also.

Q. Did there come a time when both the passenger and the driver of this vehicle were handcuffed?

A. Yes.

Q. Was that after the pat-down search?

A. Yes, it was.

[25]

Q. And was the pat-down search conducted with the individuals with their hands on the trunk of the car, or were they standing facing you, or how was it conducted?

A. When I conducted mine of Mr. Middleton, his hands were on the trunk of the vehicle at all times.

Q. And did he give you some ID card or something?

A. Yes, he did.

Q. Did that verify his identity and this address?

A. Yes, it did.

Q. And did you hear Mr. Bailey say something when — was he questioned by Detective Sneider at the back of the vehicle?

A. Basic pedigree and where he was coming from and where he was going, yes.

Q. Did you hear what he said?

A. He said, "I'm coming from my house."

And Detective Sneider asked him, "Where is that?"

He said, "It is 103 Lake Drive."

Q. And what else was said after that?

Did there come a time when he was advised that a search warrant was being executed there?

A. Yes. We first handcuffed him and told him he was not under arrest, he was being detained.

And he said, "For what reason?"

[26]

And we were stating we were going to be executing a search warrant at his residence.

Q. So the detention was in connection with the execution of the search warrant at the basement apartment of 103 Lake Drive, Wyandanch?

A. Yes, it was.

THE COURT:

And this was after he was cuffed?

THE WITNESS:

I'm sorry, your Honor?

THE COURT:

This took place after he was handcuffed?

THE WITNESS:

Yes, sir. He had asked me what this was all about, why he was being handcuffed, and I just advised him, "You are not under arrest; you are being detained."

He said, "For what?"

I told him, "We're about to execute a search warrant in your apartment."

BY MR. KELLY:

Q. You are talking to Mr. Bailey or Mr. Middleton?

A. Mr. Bailey.

Q. What did Mr. Bailey say in response, if anything, to your statement that you are now executing a search warrant at the basement apartment of 103 Lake Drive, Wyandanch?

A. He said, "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your [27] investigation."

Q. Now, after — was anything else said that you recall?

A. To Mr. Bailey?

Q. Or by Mr. Bailey?

A. No.

Q. Now, after —

THE COURT:

Let me clarify one thing. I had asked you about at time of the handcuffing, but were you the one who handcuffed Mr. Bailey or was that Detective Sneider?

THE WITNESS:

Detective Sneider.

THE COURT:

So he handcuffed Mr. Bailey, and you had this exchange with Mr. Bailey?

THE WITNESS:

I handcuffed Mr. Middleton, and I overheard Mr. Bailey asking, "What is this all about?"

I said, "You're not under arrest; you are being detained."

And at that point he said, "For what?"

I said, "We're going to be executing a search warrant in your apartment."

I might have intervened with Detective Sneider at that time.

THE COURT:

Thank you.

BY MR. KELLY:

Q. After this, what happened next?

[28]

A. We called for a uniformed patrol car to come down and bring the two individuals back to the residence.

Q. Was that done?

A. Yes, it was.

Q. And did you return to the residence?

A. Yes, I did.

Q. How did you get there?

A. I drove Mr. Bailey's car back to Lake Drive.

Q. And where did you get the keys for Mr. Bailey's car?

A. I don't recall if they were on the trunk lid or in the ignition.

Q. Did you say in the trunk?

A. On the trunk.

Q. Where on the trunk?

And is on the trunk, in the normal course, where you put property you remove from a person who is being detained?

A. Yes.

Q. After you drove — approximately how much time elapsed between the time you pulled over the vehicle Mr. Bailey is driving and the time you return to the site?

A. Within ten minutes.

Q. And when you get back to the site, are you advised by the entry team of certain findings that had been made?

A. Yes, I was.

[29]

Q. And when does that happen?

A. As I parked Mr. Bailey's car and the uniformed car stopped and Detective Sneider stopped, we kind of approached the residence together. And a couple of the entry team officers were in the driveway, and they stated that there was a handgun in plain view next to the bed and some crack cocaine on a bookshelf or something that was in the bedroom.

Q. And at that point did your view of why you were holding Mr. Middleton and Mr. Bailey change?

A. Yes.

Q. And it changed from being a detention while the search warrant was being executed to what?

A. Now it was an arrest.

Q. When you told the passenger to exit the vehicle, were you doing that in part because you were concerned about your personal safety and about the safety of Detective Sneider?

A. Yes, I was.

MR. KELLY:

Nothing further, your Honor.

THE COURT:

Okay.

MS. VALERY:

May I inquire, your Honor?

THE COURT:

Yes.

CROSS-EXAMINATION

BY MS. VALERY:

[30]

Q. Good afternoon, Detective.

A. Good afternoon.

Q. You stated that you were conducting a presurveillance search warrant status?

A. Yes.

Q. Where were you parked at the time you were conducting the surveillance?

A. We were out in the street on Lake Drive. The road kind of curves and goes into a southerly direction, so I can say it was southeast of the residence on Lake Drive.

MS. VALERY:

Your Honor, if I can approach the witness.

THE COURT:

Yes.

BY MS. VALERY:

Q. Detective, if you could please look at what has been marked for identification as Defendant's Exhibit D. Could you please describe what you are looking at, if you know?

A. This is the side of the residence at 103 Lake Drive in Wyandanch.

Q. Now, if you are looking at the house, what side of the residence is that?

A. The right side.

Q. Now, is that a fair and accurate representation of what the side of 103 Lake Drive looked like on July 28th of 2005?

[31]

A. Yes. Other than the siding.

Q. Other than the aluminum siding of the house, everything else looked the same?

A. Yes.

MR. KELLY:

Counsel, is this the one you are looking at?

BY MS. VALERY:

Q. Now, Detective, could you please look at where the fences are, the brown and then the red? Do you see that?

A. Yes.

Q. Is it your testimony that that fence looked exactly that way on July 28th of 2005?

A. Not exactly. There was a gate back in 2005.

Q. And there was a gate. Where in fact was that gate?

A. The gate was up near the house.

Q. "Up near the house" meaning the gate was flush up against the house so that there was no open area, correct?

A. Yes. When it was closed, there was no open area.

Q. So the picture that you are in fact looking at shows a straight chute to the stairs on the left?

I'll rephrase it.

Can you see stairs or a basement entrance to the left from the pictures you are looking at?

A. I can see the top portion of the stairs, yes.

Q. And you can see that in those pictures because there [32] is no gate there, correct?

A. Yes.

Q. But on the date of July 28th of 2005, there was a gate?

A. Yes, there was.

Q. And in fact the gate was closed?

A. Yes, it was.

Q. Now, you had stated that on surveillance you were watching the rear basement apartment; is that correct?

A. We were watching the right side of the house, which also contained the gate that leads to the basement apartment.

Q. Okay. Now on direct, though, you had stated that you were watching the rear basement apartment.

A. Yes.

Q. That's what you had stated?

A. Rear.

Q. Looking at that picture, on July 28th you could not see that rear basement apartment — would you agree with me? — could you?

A. We're talking about the rear doorway?

Q. Yes.

A. No, I cannot see the doorway.

Q. Could you see any part of the rear basement of the apartment on that date?

[33]

A. No.

Q. In fact, all you could see is a fence; is that correct?

A. That's correct.

Q. So in fact, when you stated you were watching the rear basement apartment, you were watching the side, the right side of 103 Lake Drive; is that correct?

A. That's correct.

Q. Do you happen to know if the side of 103 Lake Drive also has a fence connecting the neighbor's —

A. Which side are you talking about?

Q. The right side. If you are looking at the house, would you happen to know if there is a fence that connects the neighbor's yard to your yard, to the 103 Lake Drive yard?

A. I'm not sure.

Q. But looking at those pictures —

MS. VALERY:

I'm sorry, if I could be showing the government's pictures.

Give me one second, your Honor.

May I approach?

THE COURT:

Yes.

MS. VALERY:

I'm showing the Detective what has been marked as Defendant's Exhibit B.

BY MS. VALERY:

[34]

Q. Other than the fact that it is day and the obvious renovations, is that a representation of what 103 Lake Drive looked like?

A. Yes.

MS. VALERY:

Your Honor, I'd like to move that in evidence, your Honor.

MR. KELLY:

I'd like to see that, your Honor.

THE COURT:

You also want to admit D? D and B?

MS. VALERY:

Yes, your Honor. I'm going to show the government now.

MR. KELLY:

No objection, your Honor.

THE COURT:

Defendant's Exhibits B and D are admitted.

MS. VALERY:

I'm sorry, your Honor, B and C, your Honor.

THE COURT:

B and C.

(Whereupon, Defendant's Exhibits B and C were received in evidence.)

BY MS. VALERY:

Q. Detective, if you can look at what has been marked as Defendant's Exhibit B again. Looking at the front of the house, if that is in fact what the house looked like, other than renovations, there are quite a few trees on the right side of the house; isn't that correct?

A. Yes, there is.

[35]

Q. So you would agree, parked in front of the house, it would be difficult to see the right side of 103 Lake Drive?

A. Parked in front of it?

Q. Yes. Would you agree?

A. If you were directly in front of the house?

Q. Yes.

A. No, I don't think it would be hard to see that on the right side of the house.

Q. What time were you conducting this surveillance?

A. Approximately 2156 hours.

Q. So it was dark out?

A. 9 p.m.

Q. Parked where you were parked on this surveillance, is it your testimony that you had an easy physical view of the side of the house?

A. It was not unobstructed, but I could see the house fine.

Q. Meaning there was an obstruction?

A. There were a couple of branchs and whatnot, but I could see the gate clearly.

Q. You had testified as well that you saw two individuals leave the apartment at 103 Lake Drive?

A. Yes.

Q. Now, you would agree with me now you didn't, in fact, [36] see any individuals leave an apartment, did you?

A. They left the gated area to the apartment.

Q. Now, did you see them leave the apartment, Detective?

A. No.

Q. You saw them leave from a gate?

A. Yes.

Q. The two individuals, you had stated their descriptions were similar; would you agree?

A. Somewhat similar.

Q. You had stated that they were both tall and stocky, I believe?

A. Yes.

Q. And at this time you didn't know who either one of these individuals were; is that correct?

A. That's correct.

Q. You didn't have any pictures or identification of these individuals in advance?

A. No, we did not.

Q. Now you had also stated that the two individuals left the residence, correct?

A. Yes.

Q. And they left in a car, black Lexus?

A. Yes.

Q. So you would agree with me they left the premises, would you not?

[37]

A. Yes.

Q. Now, you had also stated that you waited a certain amount of time before you followed them?

A. Yes.

Q. And why did you do that?

A. Safety issue.

Q. A safety issue, meaning — what do you mean by that?

A. There's no reason to jump right on them in front of the house. We want them to get a distance

from the house before we do the actual stop, for safety reasons.

Q. Well, if you could just please expand what you mean by the fact if they're so far ahead of you at that point. What is the safety reason?

A. Well, if we stopped them too close to the residence and there are still people in the apartment we'll search the individuals. If one of them finds out we did a search of the individuals, if the entries that came to the house, they could prepare themselves with weapons, any number of things.

People waiting from the street that see us with the individuals on the side of the road and let people on the side of the road know we have them, can come out with weapons and confront me and my partner.

Q. Now you are stating why you did not confront them. That's the safety reasons?

[38]

A. Yes, the further away, the better for us.

Q. You said you waited before you let them get all the way down to Straight Path before you were actually able to catch up to them?

MR. KELLY:

Objection, your Honor. That's not the testimony, that they waited until they got down the street.

THE COURT:

I'll allow it.

A. No, we didn't allow them to get to Straight Path. Allowed them maybe 20 to 30 seconds before we actually began following them.

BY MS. VALERY:

Q. Your intentions to following them were to in fact pull them over?

A. Yes, it was.

Q. And is it your testimony as well that — you obviously — you obviously saw what house they were leaving from, correct?

A. Yes, we did.

Q. Now, you had stated you waited 20 to 30 seconds before you followed them?

A. Approximately. Could have been a little less than 20 seconds, but we let them get a few houses away before we actually started to follow them.

Q. At which point you had testified that they had [39] already been quite close, if not onto, Straight Path. Is that what you testified to?

A. No, Straight Path is a bit of a distance from where the house is.

Q. So how far, before you were able to catch up to them, did they get?

A. By the time we actually got behind them — I mean, we were able to see them the entire time. We never lost sight of them. By the time we actually got to them, we were on Mount Avenue, which leads to Straight Path.

Q. You caught up with them. You never lost sight of them. That's your testimony?

A. Yes, it is.

Q. And you testified before that the reason you waited a while was because you hadn't actually caught up to them. Is that not your testimony now?

MR. KELLY:

Objection, your Honor.

THE COURT:

Rephrase the question.

BY MS. VALERY:

Q. You had testified earlier that when your Honor had asked why you waited the length you did to pull them over — do you remember that? What is your answer to that question?

A. First and foremost, we want to get them away from the residence. By the time we got behind the vehicle, he was [40] at at the intersection of Mount Avenue and Straight Path, which is a very busy intersection.

We determined that is not a good place to stop them for our safety. He was able to make a right turn to Straight Path, which is also a very busy road, but South 18th Street is only about a block up. So as soon as he made the left turn onto South 18th Street, that's when we pulled them over.

Q. You stated Lake Drive is a long street. Is that what your term is?

A. Long compared to?

Q. Could you lose sight of the individuals at all on Lake Drive?

A. I don't believe so. Not at night with his tail-lights on. Once you come around a curve by his house, it's pretty much a straight road up.

Q. You said he went for about two traffic lights up?

A. Yes.

Q. Roughly about how many stop signs?

A. Lake Drive has two stop signs.

Q. And you said it was about approximately a mile by the time you finally pulled them over. Is that about correct?

A. Within a mile.

Q. Within a mile?

A. Within a mile, yes.

[41]

Q. At the area you pulled them over, you testified it was a safe, lit area. Is that your testimony?

A. It was well lit, yes.

Q. And you also testified that you drove his car back to the location?

A. Yes, I did.

Q. Is that normal protocol, to drive someone else's car back to the location?

A. Yes, for safety. For safekeeping. We wouldn't want the bay doors to the firehouse.

Q. You had just testified that was a safe and lit area; is that correct?

A. Yes, it was a safe, well-lit area, yes.

Q. Now at the time you pulled him over, you stated that you approached the vehicle; is that correct?

A. Yes.

Q. And you were on the passenger side of the vehicle?

A. Yes, I was.

Q. And an individual named Bryant Middleton was in the passenger side of the vehicle?

A. Yes.

Q. And you asked Middleton to exit his car?

A. Yes.

Q. At any time before you asked him to exit his car, did you ask him his name?

[42]

A. I don't recall if I asked him his name before I had him come out of the car. I'm not sure.

Q. Did you ask him for any identification at this point?

A. I don't believe so.

Q. And you had testified that you had pulled him out of the car immediately for safety reasons; is that correct?

A. Not so much immediately, but within a short period of time after we were walking up to the car.

Q. Were you speaking to him while he was in the car?

A. No, we had him shut the car off, had Mr. Bailey shut the car off. And Richie asked him where he was coming from, and at that time we told him to get out of the car.

Q. So it's your testimony Detective Sneider asked him where he was coming from while he was still seated in the car?

A. Possibly, yes, when he was still seated in the car.

Q. Possibly?

A. Said, "Shut the car off. Where are you coming from? Step out of the vehicle."

Q. Now, Detective Sneider had asked him to shut the car off, you said; is that correct?

A. Yes.

Q. Were the keys taken out of the ignition at this point?

A. I don't recall.

[43]

Q. Were the keys ever taken out of the ignition?

A. Don't recall.

Q. Well, who drove the car back to 103 Lake Drive?

A. I did.

Q. At the time you drove the car back to Lake Drive, were the keys in the ignition or had you put them in there?

A. I don't recall.

Q. Now, once Mr. Middleton was taken out of the car, what do you then do?

A. I tell him to come to the rear of the vehicle and put his hands on the rear of the trunk lid.

Q. And you prepare an immediate frisk?

A. Yes.

Q. Pat-down frisk?

A. Yes.

Q. You testified you were looking for guns?

A. Yes.

Q. Had you found any guns?

A. No, we did not.

Q. On either one of the individuals?

A. At the car stop?

Q. At the car stop.

A. No, we didn't.

Q. Was a search of the car later performed?

[44]

A. I didn't.

Q. To your knowledge, was any guns found in the car?

A. To my knowledge, no.

Q. Now, you had also stated that you asked Mr. Middleton where he was coming from.

A. Yes, I did.

Q. But you had just testified that you followed him from 103 Lake Drive, correct?

A. That's correct.

Q. So essentially you knew where he was coming from, did you not?

A. Yes, I did.

Q. Now, at the time that you patted Mr. Middleton down, where was Mr. Bailey?

A. I don't know exactly where he was.

Q. Well, if you remember, who was taken out of the car first?

A. I don't know who was taken out first.

Q. Was there a point when both individuals were at the back of the vehicle?

A. Yes, there was.

Q. And there was a point when they were both patted down, correct?

A. Yes.

Q. At that point, you had testified that Mr. Bailey made [45] a statement, correct?

A. At which point?

Q. After he's patted down, was a statement then made, or was there was a statement before?

A. The statement is made after he's handcuffed.

Q. What statement is that?

A. He had asked, "Why am I being handcuffed?"

And I had stated that, "You are not under arrest; you are being detained."

And his question was, "For what reason?"

And my answer was, "We're conducting a search warrant in your apartment."

Q. At the time — I'm sorry, were you finished?

A. At that time Mr. Bailey stated, "I don't live there. Anything you find ain't mine. And I'm not cooperating with your investigation."

Q. Now, at the time he made that statement, he is in fact handcuffed?

A. He's handcuffed, yes.

Q. Did you read him his Miranda rights at that point?

A. No, I did not.

Q. Now, was that the only statement Mr. Bailey made?

A. I don't know if he made any to any other officers.

Q. Well, at the scene of the car stop, who was present?

A. Myself, Mr. Middleton, Mr. Bailey and Detective [46] Sneider.

Q. So there were two detectives with you?

A. Yes.

Q. At the car stop, were there any other statements made, since there were only you and Detective Sneider there, that you heard?

A. By Mr. Middleton or by —

Q. By Mr. Bailey?

A. I'm not sure.

Q. Now, who performed the pat-down on Mr. Bailey?

A. Detective Sneider.

Q. Were you present when that was happening?

A. Within five feet.

Q. And if you remember, what were you doing at that point?

A. Patting down Mr. Middleton.

Q. So you would agree you were pretty much simultaneously patting each individual down?

A. Close to simultaneously, yes.

Q. How close did you say you were to each other?

A. Approximately five feet.

Q. You could hear each other's conversation, could you not?

A. If I was talking to Mr. Middleton, I would not hear what Sneider was talking to Bailey about.

[47]

Q. If you weren't speaking to Mr. Middleton —

A. If I was able to. If I was able to, yes.

Q. Now, when Detective Sneider patted down Mr. Bailey, what, if anything, was recovered?

A. Other than personal items?

Q. What personal items were you recovering?

A. I'm not sure. I didn't pat him down.

Q. Standard protocol when you do recover personal items?

A. When the person is detained, we usually put them back in the person's pockets and bring them back to the location. And if he's arrested, take it back to the property again.

Q. In this case, what happened to the personal property?

A. It was invoiced.

Q. Before that. At the scene of the stop.

A. I believe Detective Sneider might have put his wallet back in his pocket.

Q. Was there anything else found on his person at that point?

A. I don't know.

Q. You don't know.

Thank you, Detective. No further questions.

THE COURT:

Mr. Kelly, do you have any redirect?

MR. KELLY:

No, your Honor.

THE COURT:

Step down, Detective.

[48]

MR. KELLY:

The government calls Richard Sneider.

THE COURT:

Step up and remain standing, Detective Sneider.

RICHARD SNEIDER,

called as a witness, having been first duly sworn, was examined and testified as follows:

THE COURT:

Please be seated.

State your name for the record, and spell your last name.

THE WITNESS:

It's Detective Richard Sneider, S-N-E-I-D-E-R.

MR. KELLY:

May I inquire, your Honor?

THE COURT:

Yes.

DIRECT EXAMINATION

BY MR. KELLY:

Q. Good afternoon.

A. Good afternoon.

Q. How are you employed?

A. By the Suffolk County Police Department as a detective.

Q. How long have you been employed by the Suffolk County Police Department?

A. For almost 24 and a half years.

[49]

Q. And were you so employed on July 28th, 2005?

A. Yes.

Q. And what is your current position?

A. I'm currently in the first squad detectives, in a unit called the Narcotics Enforcement, Special Operations.

Q. And was that your position on July 28, 2005?

A. Yes.

Q. And what are your duties and responsibilities in that position?

A. We do special operations, mostly narcotics and guns investigations, in the first precinct.

Q. And that covers what area?

A. Town of Babylon.

Q. And on July 28, 2005, did you have occasion to seek a search warrant?

A. Yes.

Q. And what was that for? What area?

A. For a basement apartment at 103 Lake Drive in Wyandanch.

Q. And did you obtain that search warrant?

A. Yes.

Q. And who issued that search warrant? What judge signed on that search warrant?

A. Judge Lotto.

Q. L-O-T-T-O?

[50]

A. Yes.

Q. And approximately when on July 28, 2005, did you obtain that search warrant?

A. 8:45 p.m.

THE COURT:

Let me interrupt you one second.

I just want to note that Detective Gorbecki has remained in the courtroom. He obviously has testified. I don't know if defense has any objection to him remaining in the courtroom at counsel's table. I don't know if he's the co-case agent at the time.

But is there any objection to him remaining in the courtroom?

MS. VALERY:

No, your Honor.

THE COURT:

Thank you.

BY MR. KELLY:

Q. What was the object of the search warrant?

A. Weapons.

Q. And what description did you have at that point of — what information did you have on the target of the search warrant?

A. I had a description. I had the name of P-O-L-O.

Q. What description did you have?

A. I had a black male, heavy-set, stocky, dark skinned.

Q. And after you obtained the search warrant at 8:45 on July 28, 2005, what was the next stop that you took?

[51]

A. I drove to the location where Detective Gorbecki and Detective Fisher were sitting at location, and I switched places with Detective Fisher.

Q. And what was that place?

A. That was just outside of 103 Lake Drive, just up the block.

Q. In a vehicle?

A. In, I believe, an unmarked vehicle.

Q. Did you take the passenger or the driver's seat?

A. The driver's seat.

Q. At that time, was there a search team being assembled?

A. Yes.

Q. Tell the Court about that, please.

A. Detective Fisher was going over the location where the search team — it was an emergency service unit — and other detectives, other plain clothed officers and uniformed officers were going to execute the search warrant.

Q. Well, did you say emergency searches or services?

A. Emergency services, ES.

Q. ES officers?

A. ESU.

Q. At the time, were you sitting in the vehicle with Detective Gorbecki that you observe people leave from the [52] area that you considered to be part of the apartment premises?

A. Yes.

Q. And tell the Court about that.

A. At 9:56 p.m., two black males came out of the gated area and got into the black Lexus in the driveway.

Q. And in terms of the gated area, could you describe for the Court that area as it existed on July 28, 2005, when you say the gated area?

A. Yes. It is a gate connected to a fence, and then you enter inside the fenced area. There's another short, like a boxed area, the only area that leads to a set of stairs that go down to an apartment door.

Q. And how large is the area that — when you open the gate, there's an area, a walking area. How large is that area?

A. Well, if you consider the stairs included, it's like a four-by-six area but — maybe four by eight. But the area that — before the steps start is no more than four by four.

Q. Can you pass by the steps to the basement apartment and go into the backyard?

A. No, you cannot.

Q. Now, after you saw the two individuals leaving from the gate, where did they go?

[53]

A. They got into a car in the driveway, a black Lexus.

Q. And what happens next?

A. The car backed out of the driveway, and we followed it.

Q. And did you follow it immediately as it left the driveway?

A. We gave it a little distance so that we wouldn't be detected following him before we moved from where we were.

Q. Why did you do that?

A. For safety reasons. So that people in the location wouldn't see us following them, and also so that they couldn't see them following the other residents.

Q. Approximately how far did you follow them?

A. About a mile.

MR. KELLY:

Your Honor, could I get the exhibits that are in evidence?

BY MR. KELLY:

Q. Showing you Exhibit 2 in evidence, do you recognize what is portrayed on that map?

A. Yes, I do.

Q. What is it?

A. It's the route we took when we followed them that day.

Q. Does the green line on that fairly and accurately portray the route you took from the yellow dot, being 103 [54] Lake Drive?

A. Yes, it does.

Q. Now, approximately how far did you follow this vehicle for?

A. About a mile.

Q. And why did you follow them for a mile instead of a shorter distance? Would you explain that to the Court?

A. Yes. Couple reasons.

Safety reasons, again, as we don't want to stop the car too close to the house for fear people in the house may see us do the car stop. Also, we don't want to stop them on a block they live on because people may be passing by and going to that residence.

So for our own safety and for the safety of other people in the house, too. We really don't want them to arm themselves, to have them have a confrontation with our emergency services people when they arrive.

Q. And you pulled them over — for about how many minutes did you follow them?

A. Close to five minutes.

Q. And you pulled them over. Where did you eventually pull them over?

A. Behind the Wyandanch firehouse on South 18th Street.

Q. Is that a well-lit area?

A. Yes, it is.

[55]

Q. And this was done at dark, at night, right?

A. Yes.

Q. And you were the driver of the unmarked car that pulled them over, correct?

A. Yes, I was.

Q. And after you pulled them over, after you pulled the vehicle over, what did you do next?

A. Got out of the parked car, walked up to the driver's side. Detective Gorbecki walked up to the passenger area side.

I asked the driver of the car to shut the car off. He did so. I then asked him to get out of the car and come to the back of the car.

Q. Did he comply?

A. Yes, he did.

Q. And once he got to the rear of the vehicle, what happened there?

A. I asked him to place his car — his hands on the rear portion of the car, and I proceeded to pat him down.

Q. And when you patted him down — why were you patting down the driver of this vehicle?

A. Because the search warrant that we had was for weapons, so I was just trying to make sure there were no weapons on his person.

Q. And when you patted him down, did you find — what [56] are you looking for when you pat someone down? Explain to the Court.

A. Hard objects, anything that is hard that could be a weapon.

Q. Did you identify any hard objects that you removed from his person?

A. Yes, his wallet was in his back right pocket, and keys in his front left pocket.

Q. Did you remove both those items from his person as a result of the pat-down search?

A. Yes, I did.

Q. And what happened next?

A. When I was there that day there were no weapons present. We started asking them for their name.

Q. Did you conduct an identification inquiry at that point?

A. Yes, I did.

Q. Were you questioning Mr. Bailey or Mr. Middleton?

A. Mr. Bailey.

Q. What did you say to Mr. Bailey and what did he say to you?

A. I asked him who he was; told me his name. I asked him where he was coming from. He said, "My house."

I said, "Where is your house?"

He said, "103 Lake Drive."

[57]

I asked him for identification. He had a license which he took out of his wallet and gave it to me.

Q. Did you look at his license?

A. Yes.

Q. What address did it have?

A. 103 Lake Drive, Wyandanch — no, it had a Bayshore address.

Q. A Bayshore address on it?

A. Yes.

Q. Did that have any significance to you, that it had a Bayshore address?

A. Yes.

Q. Tell the Court the fact that the license that Mr. Bailey handed to you had a Bayshore address on it, had to you?

A. The confidential informant had told me that the person who he had bought from previously did live in Bayshore, that he had bought drugs from him in the area also.

THE COURT:

This is the same confidential informant you testified earlier that you had gotten a description from.

Did that come from the same confidential informant?

THE WITNESS:

Yes, it did.

[58]

BY MR. KELLY:

Q. So what happened next?

A. We handcuffed the two individuals, and shortly thereafter we told them that — they were — asked why they were being handcuffed. Told them they were being detained and that a search warrant would be executed at 103 Lake Drive.

Q. Did anyone say anything in response to that information?

A. Yes. Mr. Bailey said I'm not cooperating with this information. I don't live there, and anything you find there is not mine.

THE COURT:

You said they asked why they were being detained?

THE WITNESS:

Yes, I believe Mr. Bailey did, but — he asked why he was being detained, yes.

BY MR. KELLY:

Q. Do you remember his exact words? Mr. Bailey?

A. I remember Mr. Bailey saying —

Q. I mean just in terms, why is this happening? Do you remember exactly what Mr. Bailey said?

A. Yes. "Why am I being arrested?"

Q. This was after he was handcuffed?

A. Yes.

Q. And that's when you advised him, or some detective, [59] Gorbecki, advised him there was a search warrant being executed?

A. Yes.

Q. That's when he mentioned those three statements you mentioned earlier, correct?

A. Yes.

Q. Now there came a time, you said, when you took the keys. Did you put them on the trunk lid?

A. Yes.

Q. And what happened to them next, the keys?

A. We were going to bring the car back to 103 Lake Drive for safekeeping. I took the wallet off the trunk lid, put it back into Mr. Bailey's pocket. I either gave the keys to Detective Gorbecki or he took them off the rear deck of the car, and he drove the car back to the location.

Q. And when you arrived back at the search site, were you advised of certain findings that had been made by the emergency search team?

A. When we got back to the driveway, somebody from the emergency search unit said there was a gun and drugs in view in the house.

Q. At that point did the status of Mr. Middleton change from being detained while the search warrant was being executed to —

A. Yes.

[60]

Q. What did that change to?

A. Male under arrest.

Q. Did there come a time when you took the keys — the keys to the car, were they on a key ring?

A. Yes.

Q. Approximately how many keys were there on the key ring?

A. I don't recall. Five or six, I guess.

Q. And did there come a time when you took those keys from Detective Gorbecki or — and used them to test them?

A. At some point during the evening, Detective Gorbecki gave me back the keys. I don't recall when — to the car. The two defendants had left the scene already, because when they were placed under arrest, they were transported into the precinct. Detective Gorbecki gave me the keys.

At the very end of the search warrant, when we were leaving, somebody had mentioned that Mr. Bailey had said that — he said he didn't live there, and asked if there was a key with the keys that I had that fit the door. I said, "I don't know." I tried the key, and it fit the door.

Q. So what did you do then?

A. So I removed the door look from the door, took it as evidence.

When I got back from the precinct, I removed the [61] key ring and took that as evidence.

Q. So you logged in a single key from the key ring. The one that fit the door to the apartment, you logged that in as evidence?

A. Yes, I did.

Q. The pictures that are in front of you here, the exhibits are in evidence.

Exhibit 3, do you recognize that?

A. Yes.

Q. What is that?

A. 103 Lake Drive. The house in the front.

Q. And Exhibit 5, what does that portray?

A. That's a more recent photo of the same location, 103 Lake Drive.

Q. Exhibit 4, what does that portray?

A. That's the stairwell down and the apartment door as it was on that night, July 28th.

Q. And Exhibit 11. What does that portray?

A. That is a photo of the door as it is now.

Q. And the stairs leading to it?

A. Yes.

Q. And 6 through 10, were they taken by you recently?

A. Yes.

Q. And do they portray from different angles the area, the entry area, behind the gate to the basement apartment?

[62]

A. Yes.

Q. And the gate is not there because they were just taken recently; is that correct?

A. Correct.

Q. Did you recover — you said you recovered keys from the left front hand pocket of Mr. Bailey?

A. Yes.

Q. Did you recover one key or a group of keys?

A. A group.

MR. KELLY:

Nothing further.

THE COURT:

I have two questions before Ms. Valery questions you.

During the stop of the car, were your guns drawn at any time during that stop?

THE WITNESS:

No.

THE COURT:

And was any search ever conducted of that vehicle anytime prior to the point of returning to the scene of the search and learning that the gun had been found in the apartment with the car search, or at the time of the stop, or at any other time that you are you aware of?

THE WITNESS:

Nothing further than a visual search of the car. There was no physical search of the car at the scene.

THE COURT:

But even after the arrest, was there [63] a subsequent search of the car that you were aware of?

THE WITNESS:

I don't believe there was a search of the car. I don't believe it was done later on further.

THE COURT:

It wasn't being done later on, prior to the search of the location?

THE WITNESS:

No.

MS. VALERY:

May I proceed?

THE COURT:

Yes.

CROSS-EXAMINATION

BY MS. VALERY:

Q. Did Detective — good afternoon.

A. Good afternoon.

Q. You stated that you were on surveillance?

A. Yes.

Q. Of 103 Lake Drive?

A. Yes.

Q. What time did you actually get the search warrant approved?

A. 8:45 p.m.

Q. And what time did you begin the surveillance of 103 Lake Drive?

A. I don't know the exact time I got there. I got there, I think, about a quarter to 9:00 — quarter to 10:00, I'm sorry.

Q. So you would agree with me it was right after you had [64] gotten the search warrant approved you had started surveillance?

A. Right after I drove from the area, I got it. I had to go to a Judge's house. So right after I drove back —

Q. — you began the surveillance of the house?

A. That's correct.

Q. Other than the informant's information, had you spoke with anybody else regarding information on 103 Lake Drive?

A. No.

Q. So the informant at this point was your information?

A. Yes.

Q. Now, had you seen — other than the two individuals who left the apartment, did you see anyone else go in?

A. No.

Q. Did you see anybody else come out?

A. No.

Q. And the search warrant itself, what areas did that cover?

A. The basement apartment located in the rear of 103 Lake Drive.

MS. VALERY:

If I may approach?

THE COURT:

Yes.

BY MS. VALERY:

Q. Detective, if you could please look at what has been marked as Defendant's Exhibit B and C.

[65]

A. Yes.

Q. Are those pictures fairly and accurately representing what Lake Drive looked like on July 28th, other than the recent construction?

A. Yes. Other than the gate not being there.

Q. Now, if you could look at what the pictures are with the gates. I believe that is Exhibit B.

A. B, yes.

Q. Yes. Other than the gate not being there, that is a fair and accurate picture?

A. Yes, it is.

Q. Now the gate not being there, on September [sic] 28th of '05, the gate was, in fact, flush against the house?

A. Yes.

MR. KELLY:

I think you said September instead of July.

BY MS. VALERY:

Q. I'm sorry. In July, was the gate flush against the yard?

A. Against, flush.

Q. So you could agree you could not see the exit or the entrance to the basement apartment on that date?

A. Yes.

Q. So when you were conducting your surveillance, you could not see any sort of stairs to the apartment?

[66]

A. Correct.

Q. Now, in addition, if you could look at the picture that shows the front of the house, which is right in front of you.

Do you see any sort of obstructions on the front lawn of 103 Lake Drive?

A. Trees, yes.

Q. When you had conducted surveillance, it was nighttime?

A. Yes.

Q. So at the time you were parked in the street — you were parked in the street, correct?

A. Yes.

Q. You did not have a clear view to the back of 103 Lake Drive?

A. We had a clear view. We had an unobstructed view.

Q. Was it in fact unobstructed?

A. There was foliage, but I could see the gate. If anyone came to the gate, I could see them.

Q. But it was dark out?

A. Yes.

Q. Was there any lighting on the side of the house?

A. The front of the house was lit. The driveway, you could see the car clearly.

Q. Could you see the side of the house? Was there a [67] light on the side of the house.

A. I don't believe there was a light on the side of the house, no.

Q. Now, Detective, in connection with this case, you prepared an affidavit; is that correct?

A. Yes.

MS. VALERY:

If I could approach.

BY MS. VALERY:

Q. Detective, if you could please look at what has been marked as Defendant's Exhibit E for identification.

A. Yes.

Q. Is that, in fact, your affidavit, Detective Sneider?

A. Yes.

Q. Did you sign that affidavit?

A. Yes.

Q. If you could please look down at number two, did you in fact state that you observed two individuals leave the apartment?

A. Yes.

Q. And you had just testified that there was, in fact, a gate that blocked off your view to the basement apartment. Is that also correct?

A. Yes.

Q. And this statement, this affidavit, you swore to be the truth; is that correct?

[68]

A. Yes.

Q. Now, the statement in the affidavit that said you saw two individuals leave an apartment, you didn't in fact see two individuals leave the apartment, did you?

A. Yes, I did.

Q. Yes, you did?

A. Yes.

Q. So it's your testimony you watched two individuals leave an actual apartment at 103 Lake Drive?

A. The gated area is part of that apartment. It doesn't lead to anywhere else.

Q. But there is in fact a back to 103 Lake Drive, is there not?

A. Not accessed from that gate, no.

Q. But there is a backyard?

A. Yes.

Q. And there are — the apartment door is not on the first floor, correct?

A. Correct.

Q. So it's in the basement?

A. Yes.

Q. So there are stairs that actually go down to the apartment; is that correct?

A. Yes.

Q. So in fact you saw someone leaving a gate, behind [69] which were stairs, correct?

A. I saw two individuals come out of the gate that led to the apartment, yes.

Q. So you concluded that they left the apartment; isn't that also correct?

A. There's nowhere else you can go if you enter that gate. Yes, I concluded they came out of the apartment.

Q. Now, the two individuals, you had stated, you watched leave 103 Lake Drive, correct?

A. Yes.

Q. And the two descriptions in general were roughly similar?

A. Yes.

Q. And you had also stated it was obvious — it was dark out?

A. Yes.

Q. And with the two individuals, did you know or have reason to know at this time their names?

A. No, we did not.

Q. Or anything about them at this point?

A. No.

Q. And you watched the two individuals as they got into the black Lexus. Is that also your testimony?

A. Correct.

Q. And they left the premises at 103 Lake Drive?

[70]

A. Yes.

Q. How long after that did you follow them?

A. How long after the car went down the street?

Q. Yes.

A. I let the car get a couple hundred yards away, and then I followed them.

Q. You had stated the reason you waited was because you didn't want them to actually know you were following them?

A. Yes.

Q. Is that your testimony?

A. Yes.

Q. But you intended this entire time to pull them over; isn't that correct?

A. Yes.

Q. Now, you had also testified that you followed them for roughly about a mile?

A. Yes.

Q. And the reason you didn't detain them on the front lawn was safety reasons; is that correct?

A. Yes.

Q. The safety reasons, one being contacting someone in the apartment?

A. Yes.

Q. You had said about a mile. How long did that take you to get —

[71]

A. Four or five minutes.

Q. Four or five minutes.

At the point you were following them, could you see whether or not they were using a cell phone?

A. I didn't see anyone use a cell phone, no.

Q. But it's possible somebody could have called someone in the apartment. Isn't that possible?

MR. KELLY:

Objection.

THE COURT:

Overruled.

A. I guess it is, yes.

BY MS. VALERY:

Q. Now, when you followed them for approximately one mile, you had said you intended to pull them over?

A. Yes.

Q. And that the reason you didn't detain them was safety reasons at the house?

A. The reason we didn't detain them at the house?

Q. At the house, for safety reasons?

A. Yes.

Q. Otherwise, if safety was not an issue here, you would have detained them at the house; isn't that correct?

A. The procedure we follow is the same every time. We — if anyone leaves the house, we do not stop them next to the house. We let them leave the area, and then we detain them.

[72]

Q. When you were following them, how fast were you going?

A. Thirty miles an hour.

Q. And I would assume they were doing close to that?

A. Yes.

Q. If they had seen you in the rearview and took off, would you follow them?

A. Yes.

Q. You followed them for about two traffic lights?

A. Yes.

Q. And five stop signs, about?

A. No, I don't think that there are that many stop signs. One or two on the way. I'm not sure how many.

Q. And when you pulled them over — by the way, what traffic infraction did you pull them over for?

A. I did not pull them over for a traffic infraction.

Q. So when you pulled them over, they hadn't had any traffic violations?

A. Not that I was concerned with.

Q. But you followed them?

A. Yes.

Q. And did you ever lose sight of them?

A. No.

Q. Now, I assume — I — at one point you were a patrol officer; is that correct?

[73]

A. Yes.

Q. And in a normal routine traffic stop, would you agree you ask first for a license and registration?

A. Yes.

Q. So you would agree in this instance it wasn't a routine traffic stop?

A. To me?

Q. Yes.

A. No, it wasn't a traffic stop, a routine traffic stop at all, no.

Q. Now, at the point you pulled the defendant and Mr. Middleton over, where were you?

A. The rear of the firehouse on South 18th Street.

Q. Were you in the street or were you in the parking lot?

A. The street.

Q. And your partner had testified, would you agree, this was a well-lit area?

A. Yes.

Q. And a safe area?

A. Yes.

Q. Now, when you approached the car —

THE COURT:

May I ask this one question about pulling them over?

You had an unmarked vehicle, and you used your [74] lights to pull them over?

THE WITNESS:

We had grill lights and lights that are on the visor.

THE COURT:

Thank you.

BY MS. VALERY:

Q. How long would you say your lights were on before they pulled over?

A. A very short distance.

Q. When you pulled them over, who approached the car first, you or your partner?

A. We approached different sides of the car at the same time.

Q. And you approached Detective Bailey — I'm sorry, Mr. Bailey's side?

A. Yes, I did.

Q. And that was the driver's side of the car?

A. Driver's side.

Q. What did you tell Mr. Bailey, if anything?

A. I asked him to shut the car off. He did. I asked them to get out of the car and to the rear of the car.

Q. At the time he shut the car off, I assume he turned the key?

A. Yes.

Q. Where did he then put the keys?

A. Apparently he put them in his pocket.

[75]

Q. Apparently. But did you see him?

A. I don't recall seeing him put them in his pocket.

Q. I'm sure you heard the testimony of Detective Gorbecki that you immediately pulled them out of the car, correct?

A. Yes.

Q. And you did a pat-down at that point?

A. Yes.

Q. And that was for safety reasons?

A. Yes.

Q. And because you were concerned about guns, correct?

A. Correct.

Q. So at this point you are concerned about safety; would you agree?

A. Yes.

Q. But it's your testimony now that he was able to put his keys in his pocket. Is that your testimony?

A. I took the keys out of his pocket. So, yes, he did.

Q. And your testimony is now that you lost sight of him sometime between him exiting the vehicle and then brought to the back of the car where he's then frisked?

A. I lost sight of him, no. I was standing right next to him.

Q. So you could see him?

A. Yes.

[76]

Q. But apparently — you testified apparently he put his keys in his pocket. Is that your testimony?

A. Apparently he did, yes.

Q. Now, at which point you then bring Mr. Bailey to the rear of the vehicle?

A. Yes.

Q. And who else is in that vicinity at this point?

A. Mr. Middleton and Detective Gorbecki.

Q. And you then, I assume, conduct a pat-down?

A. Of Mr. Bailey, yes.

Q. And you conduct this pat-down for safety reasons?

A. Yes.

Q. So you pat the outside of his clothing, correct?

A. Yes.

Q. At which point you locate a set of keys?

A. Yes.

Q. And those keys were found in his pocket?

A. Yes.

Q. And at this point is the car on or off?

A. It's off.

Q. Now at this point — let's go back.

You testified if they had sped up you would have followed them.

A. Yes.

Q. Because of the chance they might flee the area; would [77] you agree?

A. Yes.

Q. So now they are outside of the car and they are surrounded by who?

A. Myself and Detective Gorbecki.

Q. And if they had ran away at that point, would you have chased them?

A. Yes.

Q. What else did you recover when you did the pat-down of Mr. Bailey?

A. His wallet.

Q. And you said also a set of keys; is that correct?

A. Yes. I thought we already said the keys and his wallet, yes.

Q. Where did you recover the set of keys from?

A. Left front pocket.

Q. And what about the wallet?

A. Right rear pocket.

Q. Did you recover any weapons on Mr. Bailey?

A. No.

Q. Once you conduct a pat-down, you then ask him his name?

A. Yes.

Q. At which point he responds his truthful name; is that correct?

[78]

A. It was simultaneous. We were asking him questions at the same time, or I did.

Q. Then what did you ask him?

A. Where he was coming from.

Q. Now, you had followed him from 103 Lake Drive, correct?

A. Yes.

Q. So in fact you knew where he was coming from?

A. Yes, I did.

Q. And then at which point you told him there was a search warrant?

A. After he was handcuffed, yes.

Q. Who handcuffed him?

A. I did.

Q. At the point he's handcuffed — after he's handcuffed, excuse me, was he read Miranda?

A. No.

Q. But he was handcuffed, correct?

A. Yes.

Q. Was Mr. Middleton handcuffed as well?

A. Yes.

Q. And I assume at this point as well, if they ran, you would have followed them, correct?

A. Yes.

Q. He wasn't put under arrest at this point, was he?

[79]

A. No.

Q. In fact, he wasn't put under arrest until after you were back at the house and conducted a search warrant, correct?

A. Correct.

Q. Who drove Mr. Bailey back to 103 Lake Drive?

A. Detective Gorbecki.

Q. And you had said that there was no search done to the inside of the vehicle?

A. I did not search the car while we were at the location, no. And I did not search it back at the house either.

Q. To your knowledge, did anyone else?

A. Not that I know of.

Q. Now, understand the protocol — I'm sure you heard your partner testify when property is found on a person, such as a wallet and keys, after they are placed under arrest, where is that property then taken?

A. We put it back in their pockets so it doesn't get mixed up with whose property is whose.

Q. What eventually happens to the property?

A. If they are arrested and brought back to the precinct, all the property is logged in.

Q. What do you mean?

A. An inventory is taken.

[80]

Q. So all the property found on Mr. Bailey is then invoiced and protocoled, and these forms are filled out?

A. Yes.

MS. VALERY:

May I approach?

THE COURT:

Yes.

BY MS. VALERY:

Q. Detective, if you could look at what has been marked as Defendant's Exhibit I.

A. Yes.

Q. Do you recognize that document?

A. Yes.

Q. What do you recognize that document to be?

A. It's a property section invoice for stuff taken in from the search warrant.

Q. Did you in fact fill that document out?

A. Yes.

Q. And you signed that document?

A. Yes.

Q. Now, if you could please look down halfway through the page under "circumstances."

A. Uh-huh.

Q. Isn't it true that you write item one through four, and then you write number five? Correct?

A. Yes.

Q. And under number five you write, "Recovered out of [81] left front pocket"; is that correct?

A. Yes.

Q. And number five is in fact listed as what?

A. Key for above locks.

Q. Does it say keys for above locks?

A. No.

Q. Does it say car keys anywhere on there?

A. No.

Q. Does it say car or ring there anywhere?

A. No.

Q. When it says "key for above lock," does it say a quantity?

A. Yes.

Q. What is the quantity?

A. One.

Q. Now, at the time that — after the stop, I'm sorry, he's brought back to the site of 103 Lake Drive —

A. Yes.

Q. You are driving —

A. — the unmarked police vehicle.

Q. And where is Mr. Bailey?

A. Mr. Bailey is brought back in that marked police car.

Q. Not in your car?

A. No, a uniformed police officer's car.

Q. So at some point during the stop, other police [82] officers came to the scene?

A. Yes.

Q. When was that?

A. We — after we had them detained, handcuffed, we called for a unit to come to bring the two people back to 103 Lake Drive.

Q. Now, did you also go back to 103 Lake Drive?

A. Yes.

Q. At this point they were not under arrest; is that correct?

A. Correct.

Q. How long was the defendant detained from start to finish?

A. Ten, twelve minutes.

MS. VALERY:

Thank you. I have no further questions.

THE COURT:

All right. Any redirect, Mr. Kelly?

MR. KELLY:

No, your Honor.

THE COURT:

You may step down, Detective. Thank you.

Mr. Kelly, do you have any other witnesses?

MR. KELLY:

No, your Honor.

THE COURT:

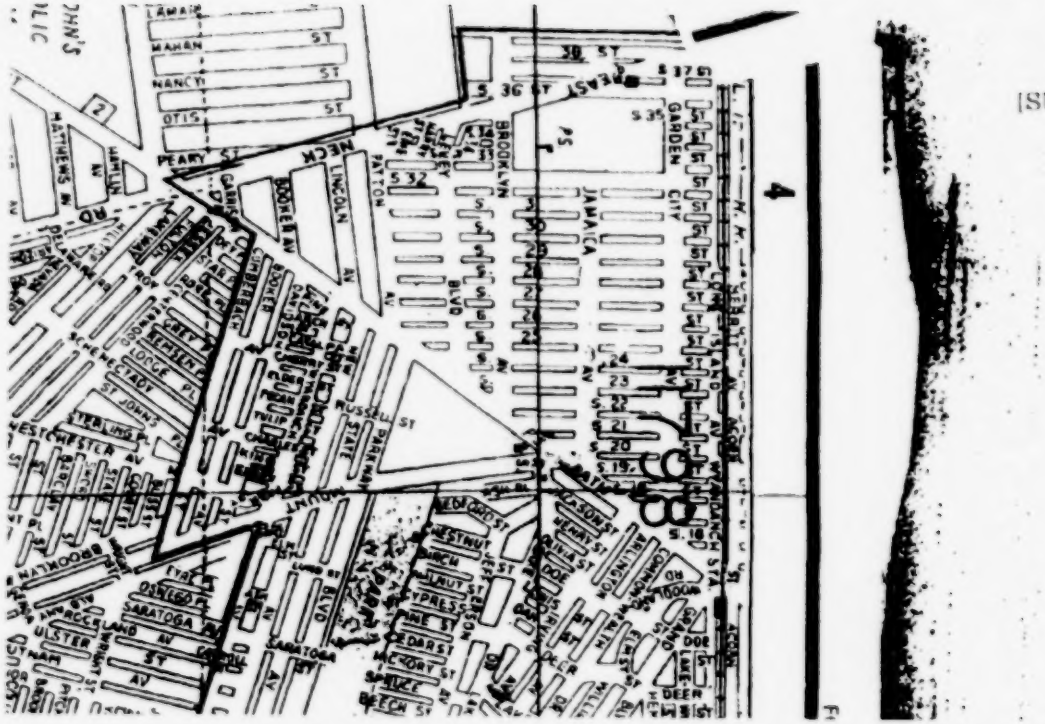
Okay.

Does defense have any witnesses?

MS. VALERY:

No, your Honor.

[SUPPRESSION HEARING EXHIBIT 2]



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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CR 06-232

UNITED STATES OF AMERICA

v.

CHUNON BAILEY, Defendant

November 1, 2006
9:50 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE,
and a jury

APPEARANCES:

For the Government:	ROSLYNN R. MAUSKOPF United States Attorney 100 Federal Plaza Central Islip, New York 11722 By: CHARLES P. KELLY, ESQ. MANU CHADDA, ESQ. Assistant U.S. Attorneys
For the Defendant:	LaRUSSO & CONWAY 145 Willis Avenue Mineola, New York 11501 By: JOSEPH R. CONWAY, ESQ. NANCY L. VALERY, ESQ.

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*****

[TESTIMONY OF DETECTIVE
DANIEL FISCHER]

[201]

DIRECT EXAMINATION

BY MR. KELLY:

Q. Good morning, Detective Fischer.

A. Good morning, sir.

Q. Where are you employed?

A. The Suffolk County Police Department.

Q. And how long have you been employed there?

A. I have been there since January of 1998, so about 19 years.

Q. Prior to joining the Suffolk County Police Department, where were you employed?

A. I was a police officer in New York City for three years.

Q. What is your position with the Suffolk County Police Department?

A. I'm a detective assigned to the First Squad detectives.

Q. How long have you had that position?

A. I have been doing that for about 11 of the last 14 years.

Q. What are your duties and responsibilities in that position?

A. Our responsibilities are to conduct narcotics investigations and weapons investigations.

Q. And drawing your attention to July 28th, 2005, were [202] you on duty that evening?

A. Yes.

Q. What were your duties that evening?

A. We were conducting a search warrant at 103 Lake Drive in Wyandanch.

Q. What part of 103 Lake Drive in Wyandanch?

A. The basement apartment.

Q. When you say you were conducting a search warrant, was this a search warrant obtained from a New York State court?

A. Yes, sir.

Q. What was the object of the search warrant?

A. We were searching for a handgun.

Q. And did this search warrant provide that entry could be at any time of the day or night?

A. Yes, sir.

Q. Did it provide that entry could be without notice of authority?

A. Yes.

Q. Now, what role did you play, starting chronologically? What was the first thing you did in connection with the execution of the search warrant that evening?

A. My first responsibility was to conduct a pre-surveillance, a pre-search warrant surveillance of 103 [203] Lake Drive.

Q. Approximately when did that start in the evening?

A. That was about 8:30 that evening.

Q. And could you explain to the jury what you mean by pre-raid surveillance of a place to be the subject of a search warrant?

A. Yes, sir.

Prior to executing a search warrant, we like to set up on the location we are going to be executing the search warrant. We do this for a couple of reasons. One was to see what kind of activities are taking place at the house before we go there. We like to know if there are people in the house. If there is nobody there, how many may have gone in there. And also, we like to keep an eye on the place in case the suspect should leave the house. We may wish to stop them before we get there.

Q. And how long did you conduct the pre-raid surveillance that you were doing at 103 Lake Drive?

A. I was there for about an hour and 15 minutes.

Q. Now, when you were doing this, what could you observe of the basement apartment at 103 Lake Drive, Wyandanch, New York?

A. We could see the driveway and the — there is a fence on the right side of the house with a gate attached. And that's the gate to the apartment. We could see that as [204] well.

Q. When you say that's the gate to the apartment, would you explain to the jury what you mean by that?

A. Sure.

If you are facing the front of the house, to the right side of the house there is a stockade fence that goes across the property, kind of set back from the front of the house. There is a gate right at the side of the house there. When you open that gate, you go into a pathway that is enclosed by another stockade fence. It is maybe about four feet or six feet or eight feet long. It is the only area inside that gate. And the only thing inside that area, it is a stairwell leading to the basement apartment.

Q. When you open the gate and you go to that four by eight area, could you then enter the backyard?

A. No, you can't.

Q. So the only place you can go is down what, a flight of stairs?

A. Yes. There is a concrete stairwell there that leads to the basement apartment, the doorway.

Q. That leads to the door of the basement apartment?

A. Yes, sir.

Q. You said you finished the pre-raid surveillance around 9:45?

[205]

A. Yes.

Q. Tell the jury what happened at that time and why your duties changed at that time.

A. Detective Sneider, the lead detective in the case, arrived at the surveillance location, and I changed places with him. He took my seat in the car and I responded back to the staging area where we set up to do the raid. I met with the Emergency Service officers helping us execute the search warrant and other officers as well.

Q. You referred to Detective Sneider, is that Detective Richard Sneider?

A. Yes, sir.

Q. You referred to him as the lead detective on the case?

A. Yes.

Q. Tell the jury about the setup. You left the site where you do a pre-raid surveillance to what site? Tell the jury what happens there with respect to the search warrant.

A. We call it a staging area. We are setting up — we meet members of the Emergency Service personnel. They execute all our search warrants for us. They make entry into the house.

Usually it is a forced entry. We met with them, several uniformed patrol officers, several plain-clothes officers. At the staging area everybody is [206] given an assignment where to go when Emergency Services goes through the house, who is going to cover the back, front and side. Those things are discussed at that location.

Then when we are ready to execute the warrant, we leave from that location in a convoy to the target location.

Q. You mentioned the Emergency Service team was part of the group at the staging area; is that correct?

A. Yes, sir.

Q. Tell the jury what their duties are, what they do and what their responsibility is on the execution of a search warrant.

A. Yes, sir.

Again, they are the team that makes entry into the residence. Their job is to make entry. And once they are inside, they are to secure every person that is in the house and make the scene safe so that we can come in and then conduct an investigation and recover evidence.

Q. They make first entry into the residence, correct?

A. Yes.

Q. They give you an all-clear, and you are permitted, the search team is permitted to enter the residence; is that correct?

A. Yes.

[207]

Q. Can you describe what happened? Did the Emergency Search team go over to the search site and make the initial entry?

A. Yes, they did.

Q. Did you go with them from the staging area?

A. Yes.

One of my responsibilities also was to be in the lead truck of the convoy. I was basically in the truck with all the Emergency Service officers. And I direct them to the house from where we are set up. And I also point the house out to them. And I run right up to the gate and point the gate out to them where they are going to go through. And then I remain outside while they go in and make the house safe and secure.

Q. Before you left the staging area, did you get a call from Detective Sneider?

A. Yes.

Q. Would you tell the jury what you learned from that phone call from Detective Sneider?

A. Yes, sir.

The detective — Detective Sneider, who was doing surveillance, advised me that they had seen two individuals, Detective Gorbecki and Sneider, two individuals getting into a vehicle in the driveway, and the driveway was near the house. And they advised they [208] were going to follow the vehicle and stop the vehicle away from the house.

Q. What happened next after you got that phone call?

A. Shortly after that we left the staging area to go execute the search warrant.

Q. And tell the jury what happened when you got to 103 Lake Drive, the basement apartment area. What were your duties there and what did you do?

A. Once the entry was made and it was secured. Emergency Services officers left the apartment and we got an all-clear to go in to recover evidence.

At that point I waited for Detective Sneider and Detective Gorbecki to arrive before I started our investigation.

Q. And how long was the Emergency Service team in the apartment until you were given an all-clear?

A. Probably two or three minutes.

Q. And after those two or three minutes, were you told anything by Emergency Service? You were told that the area — were you told anything about the area that they had just observed?

A. Yes, sir.

Q. And tell the jury what you were told by a member of the Emergency Service team as to what they observed in the apartment.

[209]

MR. CONWAY:

Objection, your Honor.

THE COURT:

Sustained.

Q. Did you eventually get an all-clear from the Emergency Service team?

A. Yes, sir.

Q. Tell the jury what the Emergency Service team has in terms of equipment, what equipment they have when they enter the apartment to make things visible.

A. They have — they use a shield with a flashlight on it. Their weapons have flashlights on the weapons. Things like that.

Q. How much time was it — once you were given the all-clear, how much time went by before Detective Sneider returned to the scene?

A. I would say somewhere in the neighborhood of five to ten minutes.

Q. And was — and once Detective Sneider returned, what did you do? What happened next?

A. At that point the first thing we do is we start the search warrant, and we take photographs of the scene, overall photographs of the house, the rooms in the area to be searched in its original condition. And that was done by myself and Detective Gorbecki before we began to search.

Q. Describe the entry down the — to the apartment — [210] describe the general layout how the rooms appeared on July — in July 2005 when you entered the apartment at 103 Lake Drive?

A. When you go through the basement apartment door you are in a hallway. You have to make a right turn. And it is a long narrow hallway that leads to — you can see a bathroom at the end of the hallway.

As you are going down the hallway on that left-hand side, there is a doorway that was locked that goes to the main part of the house. If you continue through the hallway, you are at the bathroom. It is a small bathroom. You make a left turn and just turn to the left and you are pretty much right in the kitchen.

Again, it is a pretty small kitchen area. A little table, a stove, a little counter, cabinets.

Right off the kitchen is a doorway that leads to a bedroom. And it is, I guess, an average size bedroom, kind of on the small side. There was a bed in there, maybe a king size bed on a frame. No headboard, no footboard. There was a TV on a TV stand. There was a Play Station game out. The TV was on.

To the right of the bed, if you are looking at the bed, there were a bunch of sneakers on the floor to the right of the bed. And there was a hand-gun laying on top of the sneakers to the right of the bed there.

[211]

There was also like a bookcase in the room. On top of the bookcase there was several digital scales, a large chunk of crack cocaine on a plate with a razor blade. There was another bag of powder cocaine, and a box of like sandwich bag-gies, clear plastic bags on top of the bookcase.

I would say there was some baseball caps and clothing scattered around the room as well.

Q. You say you had some duties with regard to photographs; is that correct?

A. Yes, sir.

MR. KELLY:

May I approach, your Honor?

THE COURT:

Yes.

(Counsel approaches the witness.)

Q. Placing before you a sheaf of photographs, the first one of which is marked as Exhibit 19 for identification, do you recognize that?

A. Yes, sir.

Q. What is that?

A. It is a photograph of the overall front of 103 Lake Drive

Q. Does that fairly and accurately portray the scene as it appeared on July 28th, 2005?

A. Yes, it does.

MR. KELLY:

Your Honor, the government offers [212] Exhibit 19 into evidence.

THE COURT:

Any objection?

MR. CONWAY:

No objection, your Honor.

THE COURT:

Government's Exhibit 19 is admitted.

(Whereupon, Government's Exhibit 19 was received in evidence.)

Q. Now, if you —

MR. KELLY:

May I publish these to the jury as we go through them, your Honor?

THE COURT:

Sure.

(Whereupon, the exhibit/exhibits were published to the jury.)

Q. If you take a look at Exhibit 20 that you have before you — do you see Exhibit 20 before you?

A. Yes, sir.

Q. Do you recognize the scene portrayed there?

A. Yes, I do.

Q. What is that?

A. This is a photograph of the basement stairwell and the basement apartment doorway.

Q. The bottom of it?

A. Yes.

MR. KELLY:

The government offers that into evidence, your Honor.

MR. CONWAY:

No objection, your Honor.

[213]

THE COURT:

Government's Exhibit 20 is admitted.

(Whereupon, Government's Exhibit 20 was received in evidence.)

Q. And if you look at Exhibit — do you have 27 in front of you?

A. Yes, I do.

Q. If you take a look at that, and do you recognize 27?

A. Yes.

Q. And what is that?

A. This is a photograph of a box of bullets, nine millimeter bullets found inside the TV stand in the bedroom.

Q. If you look at Exhibit 28 — where is 28 —

MR. KELLY:

The government offers Exhibit 27 into evidence, your Honor.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Exhibit 27 is admitted.

(Whereupon, Government's Exhibit 27 was received in evidence.)

Q. And showing you Exhibit 28, do you recognize that?

A. Yes, I do.

Q. What is that?

A. This is a photograph of a nine millimeter handgun, a magazine loaded with bullets, and another bullet found in the chamber, and this was found under the mattress in that [214] bedroom.

MR. KELLY:

The government offers Exhibit 28, your Honor.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Exhibit 28 admitted.

(Whereupon, Government's Exhibit 28 was received in evidence.)

Q. Exhibit 29, you recognize that?

A. Yes, I do.

Q. What is that?

A. The photograph of the same nine millimeter handgun we found under the mattress in the bedroom.

MR. KELLY:

The government offers Exhibit 29, your Honor.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Exhibit 29 admitted.

(Whereupon, Government's Exhibit 29 was received in evidence.)

(Whereupon, the exhibit/exhibits were published to the jury.)

Q. Look at Exhibit 30, do you recognize that?

A. Yes.

Q. What is that?

A. A close-up shot of a strainer and measuring cups we found in the kitchen cabinet in the apartment.

[215]

Q. And if you look at Exhibit 31, do you recognize that?

A. Yes, I do.

Q. What is that?

A. This is a photo of the same measuring cup and a strainer recovered in the kitchen cabinet. It shows it in its original location.

MR. KELLY:

The government —

Q. Do those fairly and accurately portray the scene as it appeared on the date of the search warrant?

A. Yes.

MR. KELLY:

The government offers Exhibits 30 and 31, your Honor.

MR. CONWAY:

No objection, your Honor.

THE COURT:

They are admitted.

(Whereupon, Government's Exhibits 30 and 31 were received in evidence.)

Q. If you look at Exhibit 32, do you recognize the scene portrayed in that picture?

A. Yes, sir.

Q. What is that?

A. This is a close-up of a black plastic bag that we opened up. It contained numerous rounds of .45 caliber bullets that was found in the kitchen.

MR. KELLY:

The government offers that into evidence, your Honor.

[216]

MR. CONWAY:

No objection.

THE COURT:

Exhibit 32 is admitted.

(Whereupon, Government's Exhibit 32 was received in evidence.)

Q. Exhibit 32, what is that?

A. The photo of the same plastic bags where the bullets were in, and it shows the box we found it in in the kitchen.

Q. They relate to the same black bag?

A. Yes.

MR. KELLY:

The government offers 33 in evidence, your Honor.

MR. CONWAY:

No objection.

THE COURT:

33 is admitted.

(Whereupon, Government's Exhibit 33 was received in evidence.)

Q. Look at 34, do you recognize that?

A. Yes.

Q. What is it?

A. A picture of a bag twisted up containing a quantity of crack cocaine on the floor behind the TV stand.

Q. Does it fairly and accurately portray the scene as it appeared on July 25th, 2005?

A. Yes.

MR. KELLY:

The government offers Exhibit 34.

[217]

MR. CONWAY:

No objection, your Honor.

THE COURT:

Admitted.

(Whereupon, Government's Exhibit 34 was received in evidence.)

Q. Turning to Exhibit 35, do you have it in front of you?

A. Yes.

Q. And what is that?

A. This is a photograph of the nine millimeter handgun we found by the mattress, and shows where it was recovered.

Q. Does it fairly and accurately portray the scene and the location of the handgun where it was found on the date of the search warrant?

A. Yes.

MR. KELLY:

The government offers Exhibit 35 in evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Exhibit 35 admitted.

(Whereupon, Government's Exhibit 35 was received in evidence.)

Q. Are you looking at Exhibit 36 now?

A. Yes.

Q. Do you recognize the scene portrayed in that photograph?

[218]

A. Yes, sir.

Q. What is it?

A. A photograph of the nine millimeter rifle we found in the bedroom, inside of its case.

Q. Does it fairly and accurately portray the way it appeared the — once you opened the case in the bedroom?

A. Yes. We put the screwdriver there to make it safe. Other than that it is the same.

MR. KELLY:

The government offers Exhibit 36 into evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 36 is admitted.

(Whereupon, Government's Exhibit 46 was received in evidence.)

Q. If you take a look at Exhibit 37.

Do you recognize the scene portrayed in 37?

A. Yes.

Q. What is that?

A. An overall photograph of the kitchen area.

Q. Does it fairly and accurately portray the scene as it appeared that evening?

A. Yes.

MR. KELLY:

The government offers Exhibit 37.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Exhibit 37 is admitted.

[219]

(Whereupon, Government's Exhibit 37 was received in evidence.)

Q. If you look at 38, you will — do you recognize the scene portrayed in that photograph?

A. Yes.

Q. What is it?

A. An overall photograph of the bathroom in the apartment.

Q. Is that the way it appeared on the evening of July 28th, 2005?

A. Yes.

Q. The government offers Exhibit 38 into evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 38 is admitted.

(Whereupon, Government's Exhibit 38 was received in evidence.)

Q. If you will then look at Exhibit 39 for identification.

Do you recognize the scene portrayed in that photograph?

A. Yes.

Q. What is it?

A. An overall photograph of the hallway in the apartment.

Q. Does it fairly and accurately portray the way it [220] appeared that evening, July 28th, 2005?

A. Yes.

Q. Is that the hallway you talked about leading from the doorway into the bathroom?

A. Yes. When you go into the apartment, you make a right and that's the hallway you are in.

MR. KELLY:

The government offers Exhibit 39 into evidence, your Honor.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 39 is admitted.

(Whereupon, Government's Exhibit 39 was received in evidence.)

Q. I want you to take a look at Exhibit 40, and I ask you if you recognize the scene portrayed in that photograph?

A. Yes, I do.

Q. What is that scene?

A. A photograph of a basement apartment door and it shows the damage done to the door from Emergency Service when they opened and breached the door.

Q. Because they forced their way into the apartment; is that correct?

A. Yes.

Q. And that was in accordance with the search warrant; is that correct?

[221]

A. Yes.

Q. Does this fairly and accurately portray the damage done to the door when Emergency Service made a forcible entry into the door of the basement apartment at 103 Lake Drive?

A. Yes, sir.

MR. KELLY:

The government offers Exhibit 40.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 40 is admitted.

(Whereupon, Government's Exhibit 40 was received in evidence.)

Q. If you can take a look at Exhibit 41 for identification, and tell me if you recognize the scene portrayed in that photograph?

A. Yes, I do.

Q. And what is it?

A. A photograph — a close-up photograph of a handgun that was recovered on top of the sneakers in the bedroom.

Q. Does it fairly and accurately portray the location and scene where the gun was located, the black handgun, on the floor of the bedroom on July 28th, 2005?

A. Yes, sir.

MR. KELLY:

The government offers Exhibit 41 into evidence.

MR. CONWAY:

No objection.

[222]

THE COURT:

Exhibit 41 is admitted.

(Whereupon, Government's Exhibit 41 was received in evidence.)

Q. Exhibit 42, can you tell me if you recognize the scene portrayed in that photograph?

A. Yes.

Q. What is it?

A. Another photograph of the bedroom floor showing where the sneakers were to the right of the bed. You can also see the .45 caliber handgun lying on top of the sneakers on the floor there.

Q. So is this a distant view, and 41 is a close-up view, and 42 is a more distant view of where the handgun was on the floor of the bedroom?

A. Yes, it is.

MR. KELLY:

The government offers 42 in evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 42 is admitted.

(Whereupon, Government's Exhibit 42 was received in evidence.)

Q. Take a look at Exhibit 42, detective, and see if you recognize the scene portrayed in that photograph?

A. Yes.

Q. And what is the scene portrayed in that photograph?

[223]

A. This is an overall photograph of the inside of the bedroom.

Q. Does it fairly and accurately portray the way it appeared on the evening of July 28th, 2005?

A. Yes.

MR. KELLY:

The government offers Exhibit 43 into evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 43 is admitted.

(Whereupon, Government's Exhibit 43 was received in evidence.)

Q. If you take a look at Exhibit 44 for identification, do you recognize that?

A. Yes.

Q. And what is that?

A. This is another overall photograph of the bedroom that shows — again, the right side of the bed where the sneakers were, where the handgun was.

Q. Does that fairly and accurately portray that part of the bedroom on the evening of July 28th, 2005?

A. Yes.

MR. KELLY:

The government offers 44 into evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 44 is admitted in evidence.

[224]

(Whereupon, Government's Exhibit 44 was received in evidence.)

Q. Government's Exhibit 45 for identification.

Detective, if you take a look at that and tell me if you recognize the scene portrayed in that photograph, sir.

A. Yes, I do.

Q. And what is it?

A. This is another photograph of the bedroom. It is taken from the doorway. You can see the TV and the bookcase in the bedroom.

MR. KELLY:

The government offers Exhibit 45.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 45 is admitted.

(Whereupon, Government's Exhibit 45 was received in evidence.)

Q. If you take a look, Detective, at Exhibit 46 for identification, and tell me if you recognize the scene portrayed in that photograph, Exhibit 46.

A. Yes, I do.

(Whereupon, the exhibit/exhibits were published to the jury.)

Q. What is the scene portrayed in Exhibit 46?

A. This is a close-up photograph of a bullet-proof vest we found in the bedroom behind the bookcase leaning up [225] against the wall. It was on the floor.

MR. KELLY:

The government offers Exhibit 46 into evidence.

MR. CONWAY:

No objection.

THE COURT:

46 is admitted.

(Whereupon, Government's Exhibit 46 was received in evidence.)

Q. If you can look at Exhibit 47 for identification, do you recognize the scene portrayed in that photograph?

A. Yes, sir.

Q. What is that?

A. It is another photograph showing the bullet-proof vest on the floor behind the bookcase. It also shows the nine millimeter rifle case in the corner.

Q. And does that fairly and accurately portray the scene as it looked on the evening of July 28th, 2005?

A. Yes.

MR. KELLY:

The government offers Exhibit 47 in evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Government's Exhibit 47 is admitted.

(Whereupon, Government's Exhibit 47 was received in evidence.)

Q. If you can take a look at Exhibit 48, Detective, and tell me if you recognize the scene portrayed in that [226] photograph?

A. Yes, I do.

(Whereupon, the exhibit/exhibits were published to the jury.)

Q. What is the scene portrayed in that photograph?

A. It is a photograph of the top of that bookcase in the bedroom that shows a close-up of the digital scales, the ceramic plate with the crack cocaine on it, a razor blade. It shows a plastic bag of cocaine, and a box of sandwich bags.

Q. What did you say was on the plate in this photo?

A. Crack cocaine.

MR. KELLY:

The government offers Exhibit 48 into evidence, your Honor.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 48 is admitted.

(Whereupon, Government's Exhibit 48 was received in evidence.)

Q. If you take a look at Exhibit 49, detective, and tell me if you recognize the scene portrayed in that photograph.

A. Yes, I do.

Q. What is that?

A. Again, it is the same photo that the top of the bookcase — of the bookcase. It was taken a little [227] further away. It shows the same items, the crack on the plate, the scale, the plastic bags of the cocaine and the rifle case in the background.

Q. It is a more distant view?

A. Yes, that's correct.

MR. KELLY:

The government offers Exhibit 49 into evidence.

MR. CONWAY:

No objection.

THE COURT:

Government's Exhibit 49 is admitted in evidence.

(Whereupon, Government's Exhibit 49 was received in evidence.)

Q. If you take a look, detective, at Exhibit 50, and tell me if you recognize the scene portrayed in that photograph.

A. Yes, sir.

(Whereupon, the exhibit/exhibits were published to the jury.)

Q. What is it?

A. This is a photograph of the .45 caliber handgun that was on the bedroom floor on top of the

sneakers. This is a photo of the gun with the magazine taken out of it and the bullet that was in the chamber taken out of it.

Q. Does it fairly and accurately portray the way it appeared once you took the magazine out of it and the [228] bullet out of the chamber?

A. Yes.

Q. And that's the black handgun?

A. Yes, it is.

Q. That we previously saw in its original location with all the sneakers; is that correct?

A. Yes.

MR. KELLY:

The government offers Exhibit 50 into evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Government's Exhibit 50 is admitted into evidence.

(Whereupon, Government's Exhibit 50 was received in evidence.)

MR. KELLY:

The government believes that Exhibits 19, 20 — 19, 20 and photographs 27 to 50 are in evidence, your Honor, we move those exhibits.

MR. CONWAY:

No objection to any of those exhibits, your Honor.

THE COURT:

I didn't hear what you said, Mr. Kelly. What was your comment?

MR. KELLY:

My comment is that it concludes the photographs shown to this witness. And I believe Exhibits 19 to 20 and 27 to 50 are in evidence.

THE COURT:

They are all in evidence at this [229] time, and for the record they are all being published to the jury.

Q. Now, after photographing the areas and the items in the apartment, what did you do next?

A. Umm, I assisted Detective Gorbecki and Detective Sneider in recovering evidence and searching for evidence in the apartment.

Q. And Detective Sneider was the lead detective?

A. Yes, sir.

Q. And describe for the jury the steps — the procedures taken in carrying out the search?

A. Umm, after we recovered evidence, photographs were taken of the evidence in its original location, if possible. The evidence is then recorded on a document where it was found, what time it was found. It is secured, and it is prepared to go back to the precinct so it can be invoiced to the lab or other departments for fingerprint analysis.

THE COURT:

Detective, can you just move — Detective, would you move your chair a little closer to the microphone so everyone can hear you a little better?

THE WITNESS:

Sure.

THE COURT:

Thank you.

MR. KELLY:

May I approach, your Honor?

THE COURT:

Yes.

[230]

MR. KELLY:

Thank you.

(Counsel approaches the witness stand.)

Q. Placing before you Exhibit — I will have to check the list — of a white piece of material, do you recognize that?

A. Yes, I do.

Q. What is that?

A. This is the bullet-proof vest that we recovered from the apartment.

Q. Exhibit 56, it is —

MR. KELLY:

The government offers Exhibit 56 into evidence.

MR. CONWAY:

No objection.

THE COURT:

56 is admitted.

(Whereupon, Government's Exhibit 56 was received in evidence.)

Q. Placing before you Exhibit 57 — 54, just 54.

(Handed to the witness.)

Q. Do you recognize that?

A. Yes, I do.

Q. What is that?

A. Well, this is the case containing the nine millimeter rifle that we found in the bedroom.

Q. And open it up.

(The witness complies.)

[231]

Q. Do you recognize that?

A. Yes, I do.

Q. All right.

What is it?

A. It is the nine millimeter rifle we recovered out of the bedroom.

Q. Has it been secured so that it is inoperable at the moment?

A. Yes, it is, sir.

MR. KELLY:

The government offers the nine millimeter rifle into evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Do they have separate exhibit numbers?

MR. KELLY:

Yes, Exhibit — no, the case and the rifle are Exhibit 54, your Honor.

THE COURT:

All right.

Government Exhibit 54 is admitted in evidence.

(Whereupon, Government's Exhibit 54 was received in evidence.)

Q. Placing before you a gun.

(Handed to the witness.)

Q. Do you recognize that gun?

A. Yes, I do.

Q. What is that?

[232]

A. This is the .45 caliber handgun that we recovered from the floor to the right of the bed on top of the sneakers at the apartment.

MR. KELLY:

The government offers that gun, 53-A, into evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Government's Exhibit 53-A is admitted in evidence.

(Whereupon, Government's Exhibit 53-A was received in evidence.)

Q. And do you recognize with it another item, this — the item in the upper right-hand corner of that exhibit, what is that?

A. It is the magazine for the record.

Q. The magazine is 53-B, and you recognize that as being the magazine for the weapon, 53-A?

A. Yes, sir.

MR. KELLY:

The government offers the magazine for the .45 caliber gun into evidence as Exhibit 53-B.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Government's Exhibit 53-B is admitted in evidence.

(Whereupon, Government's Exhibit 53-B was received in evidence.)

Q. Do you see another item in there, being a small white [233] box?

A. Yes, sir.

Q. When I say in there, I mean within the same holder that the gun and the magazine, 53-A and B are in. The box says 53-C, do you know what the box can tapes?

A. It should contain the bullets that were in the magazine and in the weapon.

MR. KELLY:

The government offers the white box, 53-C into evidence.

MR. CONWAY:

No objection.

THE COURT:

Government's Exhibit 53-C is admitted in evidence.

(Whereupon, Government's Exhibit 53-C was received in evidence.)

Q. Placing before you a weapon and a magazine and a white box, the gun being 52-A for identification, do you recognize 52-A for identification?

(Handed to the witness.)

A. Yes.

Q. And what is that?

A. The nine millimeter handgun that was under the mattress in the bedroom.

MR. KELLY:

The government offers the nine millimeter gun as Exhibit 52-A into evidence.

MR. CONWAY:

No objection.

[234]

THE COURT:

Exhibit 52-A is admitted in evidence.

(Whereupon, Government's Exhibit 52-A was received in evidence.)

Q. Do you recognize the black rectangular item next to the gun?

A. Yes, it is a magazine for the weapon.

MR. KELLY:

The government offers the magazine, Government's Exhibit 52-B into evidence.

MR. CONWAY:

No objection.

THE COURT:

52-B is admitted.

(Whereupon, Government's Exhibit 52-B was received in evidence.)

Q. Again, there is a white box there with your understanding —

A. It should contain nine millimeter bullets that were in the gun.

MR. KELLY:

The government offers the box, 52-C, with its contents into evidence.

MR. CONWAY:

No objection.

THE COURT:

52-C, Government's Exhibit, is admitted in evidence.

(Whereupon, Government's Exhibit 52-C was received in evidence.)

Q. Placing in front of you the three black rectangular [235] objects that — for identification as 59-D.

(Handed to the witness.)

Q. Do you recognize those?

A. Yes, I do.

Q. What are those?

A. These were the digital scales that were recovered from the bedroom.

MR. KELLY:

The government offers the digital scales, which are 59-D, as in David, into evidence.

MR. CONWAY:

No objection.

THE COURT:

In evidence.

(Whereupon, Government's Exhibit 59-D was received in evidence.)

Q. Placing before you 60-A, as in Allen, a ceramic plate. Do you recognize that?

A. Yes.

Q. What is that?

A. The ceramic plate that was on top of the bookcase that had the crack cocaine on it.

Q. And it was in one of the photographs we put into evidence earlier; is that correct?

A. Yes.

MR. KELLY:

The government offers that plate, being 60-A, into evidence.

THE COURT:

K-A is — 60-A is admitted.

[236]

Any objection?

MR. CONWAY:

No objection.

THE COURT:

It is admitted.

(Whereupon, Government's Exhibit 60-A was received in evidence.)

Q. Placing before you 60-B, do you recognize that?

A. Yes.

Q. What is that?

A. The box of clear plastic sandwich bags found on the bookcase in the bedroom.

MR. KELLY:

The government offers Exhibit 60-B, as in Billy, the box of sandwich bags into evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

60-B is admitted.

(Whereupon, Government's Exhibit 60-B was received in evidence.)

Q. Placing before you a blade within a container, do you recognize that exhibit which is 60-C, for Charley, for identification?

A. Yes.

Q. What is that?

A. This is the razor blade that was on the plate with the crack cocaine on the bookcase.

Q. And it has been put in a container for safety reasons by law enforcement; is that correct?

[237]

A. Yes.

MR. KELLY:

The government offers Exhibit 60-C, being the razor blade, into evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

60-C is admitted.

(Whereupon, Government's Exhibit 60-C was received in evidence.)

Q. Now, placing before you an exhibit, a bag marked 109992, six numbers in a row, which has been identified as Exhibit 51.

Do you recognize the contents of that bag?

(Handed to the witness.)

A. Yes.

Q. What is it?

A. The plastic bag behind the TV stand on the floor that contained crack cocaine.

MR. KELLY:

The government offers 51-B into evidence.

MR. CONWAY:

I missed the number.

THE COURT:

As did I.

MR. KELLY:

51-B, as in Bobby.

MR. CONWAY:

No objection.

THE COURT:

51-B is admitted.

(Whereupon, Government's Exhibit 51-B was received in evidence.)

[238]

Q. Placing before you 51-A, as in Allen, control bag 109990, do you recognize the contents of that bag?

A. Yes, I do.

Q. And what is that?

A. This is the crack cocaine and the powder cocaine that was found on the bookcase in the bedroom.

Q. Placing before you a black bag, would you examine the contents and tell me if you recognize that being Exhibit 58 for identification? Do you recognize that?

(Handed to the witness.)

A. Yes, I do.

Q. And what is that?

A. The black plastic bag that contained the .45 caliber bullets that we found in the kitchen.

MR. KELLY:

The government offers the bag of bullets, being Exhibit 58, in evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

50-A is admitted.

MR. CONWAY:

58, your Honor.

THE COURT:

58 is admitted.

(Whereupon, Government's Exhibit 58 was received in evidence.)

THE COURT:

Did you admit 51-A?

MR. KELLY:

I thought we did, and the government offers 51-A in evidence.

[239]

MR. CONWAY:

I don't think they did, but I have no objection.

THE COURT:

51-A is admitted.

(Whereupon, Government's Exhibit 51-A was received in evidence.)

Q. Placing before you a box marked for identification as Exhibit 57.

Do you recognize that box?

A. Yes, I do.

Q. And what is that?

A. This is the box of nine millimeter bullets we found in the TV stand in the bedroom.

Q. And those — did the —

MR. KELLY:

The government offers the box of bullets, being Government's Exhibit 57, into evidence.

MR. CONWAY:

No objection.

Q. And these —

THE COURT:

57 is admitted.

(Whereupon, Government's Exhibit 57 was received in evidence.)

Q. And these are nine millimeter bullets?

A. Yes, sir.

Q. And they would work in a nine millimeter gun found in the bedroom; is that correct?

A. In the bedroom under the mattress, yes.

[240]

Q. And those 40 — these, the .45 caliber, these would work inside the black handgun that was found near the sneakers; is that correct?

A. Yes, sir.

Q. And placing before you a Pyrex measuring cup, which has been identified as Exhibit 59-B, as in Billy, for identification. Do you recognize that?

(Handed to the witness.)

A. Yes, I do.

Q. What is that?

A. The measuring cup we recovered from the kitchen cabinet in the apartment.

MR. KELLY:

The government offers 59-B into evidence.

MR. CONWAY:

No objection.

THE COURT:

59-B in evidence.

(Whereupon, Government's Exhibit 59-B was received in evidence.)

Q. 59-C, do you recognize the contents of that bag?

A. Yes, sir.

Q. What is that?

A. The utensils found inside the measuring cup.

Q. Inside the exhibit that we just looked at; is that correct?

A. Yes, sir.

[241]

Q. So, inside 59-B were the contents of the bag, 59-C; is that correct?

A. Yes, sir.

MR. KELLY:

The government offers 59-C into evidence, consists of a knife, spoon and hand mixer.

MR. CONWAY:

No objection.

THE COURT:

59-C is admitted.

(Whereupon, Government's Exhibit 59-C was received in evidence.)

Q. Now, placing before you 59-A, as in Allen, do you recognize that?

(Handed to the witness.)

A. Yes, sir.

Q. What is that?

A. These are the strainers that were found on top of the measuring cup on the kitchen — in the kitchen cabinet.

MR. KELLY:

The government offers 59-A into evidence.

MR. CONWAY:

No objection.

THE COURT:

59-A is admitted.

(Whereupon, Government's Exhibit 59-A was received in evidence.)

Q. Placing before you Exhibit 55 for identification, do you recognize Exhibit 55?

A. Yes, sir.

[242]

Q. And what is that?

A. This is the doorknob and a dead bolt lock to the basement apartment door.

This is the key to the lock and the doorknob.

Q. And that's — the doorknob and the lock that were on the door to the basement apartment on July 28th, 2005, at 103 Lake Drive; is that correct?

A. Yes.

Q. And that's the key recovered from Mr. Bailey; is that correct?

A. Yes, sir.

MR. KELLY:

And the government offers Exhibit 55, being a key and two locks from a door into evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Exhibit 55 is admitted.

(Whereupon, Government's Exhibit 55 was received in evidence.)

Q. Now, that key, would you test the key on those two locks and tell us if it works.

A. Sure.

(The witness compiles.)

A. It works in the doorknob. I just tested that.

Q. It works for the doorknob?

A. Yes.

Q. Would you test it with the dead bolt lock, detective, [243] and tell us if that works also.

(The witness complies.)

A. The screws are in the way, and I have to turn the screws out of the way to turn the knob.

Q. Take your time, detective.

THE COURT:

So the record is clear, the detective put the key into the doorknob and turned it previously. Now he has it in the other lock, and he is turning it.

A. I need a screwdriver: I can't get the screw out. It has to come out so I can turn the lock.

Q. Well, without taking the screws out, detective, if you would just hold it there and turn the key, do you see a turn of the lock itself?

A. Yes.

Q. All right. Thank you.

Now, did you retrieve certain documents or identification material during the search?

A. Yes, sir.

Q. Placing in front of you a card which is Exhibit number 62-A, do you recognize that card?

A. Yes, I do.

Q. And what is that?

A. It is a Resorts International club card, with Chunon Bailey's name on it.

[244]

Q. And was it retrieved that evening during the search of the basement apartment at 103 Lake Drive in Wyandanch, New York?

A. Yes, it was.

MR. KELLY:

The government offers 62-A, being the Resorts International card, entitled, Uptown Preferred

Member Club, Chunon L. Bailey, Resorts, Atlantic City, into evidence.

MR. CONWAY:

Your Honor, can I just have a quick voir dire?

THE COURT:

Yes.

VOIR DIRE EXAMINATION

BY MR. CONWAY:

Q. Detective Fischer, do you have any photographs of this card?

A. No, sir.

Q. Did you take any photographs that night of this card?

A. I believe we only have a photocopy of this card.

Q. Did you taken any photographs of any of the other documents that Mr. Kelly is about to show you?

A. No, sir.

Q. Do you have any documents showing where these items were actually found?

A. No, sir.

[245]

MR. CONWAY:

Your Honor, I would object at this time to this and any other documents.

THE COURT:

Why don't counsel approach.

Why don't we just take our lunch break now, ladies and gentlemen. It is 12:35. Let's try — let's try to start at 1:50. We are breaking early for lunch. So try to get back to the jury room by ten to.

Please do not discuss the case among yourselves or anyone else, and have a great lunch.

(Whereupon, at this time the jury leaves the courtroom.)

THE COURT:

Please be seated.

Mr. Kelly, how can the government establish — the detective testified these were taken from the apartment. But he didn't establish how he could testify to that. What was the basis for that?

MR. KELLY:

He said he was part of the search and he recognized the documents as taken from the search site. Whether he photographed it or dusted it for fingerprints goes to weight and not admissibility, your Honor.

THE COURT:

Given that there is an objection to this and not the other documents, it is important as to whether the series of documents — it is important to show the procedure how they were taken, who took them and how [246] they were handled at the time of the search, and we will see if there is a further objection and then I will rule on it. But I want you to lay a further foundation as to the procedure for taking the documents during the search.

MR. KELLY:

I'm happy to do that. And I just wished to expedite.

THE COURT:

I understand. Obviously there were not a lot of objections to much of this. And you should do that. And Mr. Conway can tell me if he objects to it afterwards, and we will go on.

Please be back at ten to 2:00.

MR. KELLY:

Yes.

THE COURT:

How much further do you have, Mr. Kelly, with this witness, do you feel, as to time?

MR. KELLY:

15 minutes.

THE COURT:

Okay. Thank you.

(Luncheon Recess.)

[247]

AFTERNOON SESSION

THE COURT:

Is there anything either side needs to make before we bring the jury in?

MR. KELLY:

We worked on a stipulation regarding the expert witnesses. We can work on that later.

THE COURT:

So in terms of where we left off before lunch, Mr. Kelly, as I said before lunch, lay a foundation as to how either these detectives personally seized those items or someone else, with regard to what Mr. Conway objected to.

MR. KELLY:

Yes, your Honor.

THE COURT:

Okay. Let's bring the jury in.

(Whereupon, the jury at this time enters the courtroom.)

THE COURT:

Please be seated.

Hope everyone had a good lunch.

We're ready to proceed and continue with the direct examination of Detective Fischer.

I'll remind you, Detective Fischer, you are still under oath.

THE WITNESS:

Yes, sir.

DIRECT EXAMINATION

BY MR. KELLY:

(Continued)

Q. Before lunch, we were talking about the seizure of [248] documents as part of the execution of the seizures of the documents at 103 Lake Drive. Do you recall that?

A. Yes.

Q. If you can tell the jury the procedure that the Suffolk County Police Department follows with respect to the seizure of paperwork and ID cards during the execution of a search warrant such as this?

A. Sure.

Normally when we're searching the apartment, we're searching the entire apartment for everything. During the course of the search, documents are recovered. Any identifiable objects are recovered and not normally photographed.

Usually we photograph them at the precinct because they are not in their original position when they got them. Things are disturbed. We'll take a copy of it at the precinct or squad and hold on to the documents.

Q. You said any identifiable object. Do you mean any object or item with identification on it?

A. Yes, sir.

Q. Now, were ID cards or documents that were seized that evening?

A. Yes, sir.

Q. And —

MR. KELLY:

May I approach, your Honor?

[249]

THE COURT:

Yes.

BY MR. KELLY:

Q. Could you tell the jury what role you played in seizing ID cards or documents?

A. I searched for documents. I recovered a couple of documents. I was also present when other documents were recovered.

Q. Tell the jury where you located documents during your search of 103 Lake Drive's basement apartment.

A. Sure. There were several boxes on the kitchen table. There were documents recovered from those boxes.

Q. And showing you Exhibit 33 in evidence, do you recognize that?

A. Yes.

Q. And tell the jury what that shows.

A. This is a photograph of a shoe box, actually couple of boxes, on the kitchen table in the apartment.

Q. And does that show one of the boxes from which — or the boxes from which you recovered documents during the search of 103 Lake Drive?

A. Yes.

Q. And when you refer to the shoe box, you are referring to the box on top that has the black bag in it?

A. Yes.

Q. Is that the black bag of bullets?

[250]

A. Yes.

Q. Now, showing you this exhibit, this ID card that we discussed before the break, number 62-A, what role did you play in seizing that document?

A. I recovered this document from the shoe box in the kitchen.

Q. From the shoe box that is portrayed in photo 33; is that correct?

A. Yes.

MR. KELLY:

The government offers 62-A, the Resort International photo — not photo, ID card.

MR. CONWAY:

No objection.

THE COURT:

I'm sorry?

MR. CONWAY:

No objection.

THE COURT:

Government's Exhibit 62-A is admitted.

(Whereupon, Government Exhibit 62-A was received in evidence.)

BY MR. KELLY:

Q. Placing before you 62-H, do you recognize that document?

A. Yes, I do.

Q. What role, if any, did you play in seizing 62-H?

A. I recovered these documents from the same shoe box in the kitchen.

[251]

Q. You personally recovered them?

A. Yes, I did.

Q. From the shoe box portrayed in Exhibit 63?

A. Yes.

MR. KELLY:

The government offers 62-H.

MR. CONWAY:

May I see what that is?

MR. KELLY:

The four pay stubs from K-mart, your Honor.

MR. CONWAY:

No objection, your Honor.

THE COURT:

62-H is admitted.

(Whereupon, Government Exhibit 62-H was received in evidence.)

MR. KELLY:

Your Honor, may I publish 62-A, 62-H, along with photo 33 already in evidence?

THE COURT:

62-H is one exhibit. Do you want to staple that so it is given as one exhibit?

MR. KELLY:

Yes, your Honor.

BY MR. KELLY:

Q. Now, were there other documents seized other than 62-A and 62-H? Were there other documents seized from the apartment that evening?

A. Yes.

Q. What role did you play in the seizure of those documents?

A. I was present when they were recovered, when they [252] were found.

Q. Describe your presence to the jury. You say you were present.

Describe how the search of the boxes in the kitchen where the bullets and the ID card that is in evidence and the K-mart pay stubs that are in evidence were found.

A. It's a small kitchen. Myself, Detective Sneider, Detective Gorbecki, were in the kitchen at the table going through the contents of the boxes, and they were recovered while I was present.

Q. Showing you 62-G for identification, being a two-page document that I will shortly staple, do you recognize that document?

A. Yes.

Q. And were you present when that document was seized, was found and seized?

A. Yes.

MR. KELLY:

The government offers 62-G into evidence.

THE COURT:

Any objection?

MR. CONWAY:

May I just see that again, Mr. Kelly?

MR. KELLY:

Yes.

MR. CONWAY:

No objection.

[253]

THE COURT:

62-G is admitted.

(Whereupon, Government Exhibit 62-G was received in evidence.)

BY MR. KELLY:

Q. And showing you 62-E, being a photocopy of an envelope and something entitled "Mail Money Received" —

A. Yes.

Q. — tell the jury why you recognize it.

A. These items were recovered from those boxes. I was present when they were recovered from the boxes in the kitchen.

MR. KELLY:

The government offers Government's Exhibit 62-E in evidence.

MR. CONWAY:

No objection.

THE COURT:

62-E is admitted.

(Whereupon, Government Exhibit 62-E was received in evidence.)

BY MR. KELLY:

Q. Placing before you 62-D, as in David, do you recognize — that's a photocopy of an envelope of a document.

Do you recognize that?

A. Yes, sir.

Q. What is that?

A. These are documents that were also found in those [254] kitchen boxes, and I was present when they were found.

MR. KELLY:

And the government offers Exhibit 62-D, as in David, into evidence.

MR. CONWAY:

No objection.

THE COURT:

62-D is admitted.

(Whereupon, Government Exhibit 62-D was received in evidence.)

BY MR. KELLY:

Q. Placing before you 62-C for identification, as in Charlie, do you recognize that photocopy of an envelope and a letter?

A. Yes, sir.

Q. What is that?

A. This is another document that was recovered from the kitchen boxes, and I was present when they were recovered.

MR. KELLY:

The government offers 62-C into evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

62-C is admitted.

(Whereupon, Government Exhibit 62-C was received in evidence.)

BY MR. KELLY:

Q. And placing before you 62-B, which consists of an original envelope and a photocopy of a letter dated December 1, 2004, do you recognize that?

[255]

A. Yes, I do.

Q. What is that?

A. This is a letter that was recovered from the boxes in the kitchen, and I was present when it was recovered.

MR. KELLY:

The government offers 62-B into evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

62-B is admitted.

(Whereupon, Government Exhibit 62-B was received in evidence.)

MR. KELLY:

Your Honor, may the government publish 62-B, 62-C, 62-D, 62-E, and 62-G to the jury?

THE COURT:

Yes.

BY MR. KELLY:

Q. Did you find any documents in the name of Angie?

A. No, sir.

Q. Did you find any documents in the name of anyone other than Chunon Bailey?

A. No, sir.

Q. And what type of clothing was in the apartment?

A. It was all male clothing in the apartment.

Q. Was there any female clothing in the apartment?

A. Yes.

Q. Lingerie, panty hose?

A. Yes.

[256]

Q. How would you characterize the appearance of the apartment when you got there?

A. It appeared that someone had recently moved in.

Q. Did you see anything in boxes?

A. Yes, sir.

Q. What?

A. I saw pots and pans in a box.

Q. Did you see anything else in boxes besides pots and pans in boxes?

A. There was a cable box and some cell phones in a box. Looked like it had not been unpacked.

Q. Had not been?

A. Had not been.

*****

[270]

BY MR. CONWAY:

Q. You testified at approximately 9:45 you left the vicinity to go back to the search headquarters, correct?

A. Yes.

Q. So you weren't present when anybody left the premises at that time, correct?

A. Correct.

Q. Now, you testified that the search procedure was, I believe you said the ES team, the ESU or ES team —

A. Yes.

Q. — was the first team to enter?

A. Yes.

Q. They went in, and as we saw from the photographs, broke the front door in and went into the apartment, correct?

A. Yes.

Q. When that happens, where are you at that time?

A. I ran up to the gateway and pointed out the gate, and [271] waited at the outside of the stairwell to the basement apartment until it was clear.

Q. So you waited outside until it was clear.

And correct me if I'm wrong, that means the ESU people went in, checked the residence, or secured the residence, as you said, and two, three minutes later, they came out, and that's when you gained entry?

A. Yes, sir.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CR 06-232

UNITED STATES OF AMERICA

v.

CHUNON BAILEY, Defendant

November 2, 2006
9:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE,
and a jury

APPEARANCES:

For the Government:	ROSLYNN MAUSKOPF United States Attorney 100 Federal Plaza Central Islip, New York 11722 By: CHARLES P. KELLY, ESQ. MANU CHADDA, ESQ. Assistant U.S. Attorneys
For the Defendant:	LaRUSSO & CONWAY 145 Willis Avenue Mineola, New York 11501 By: JOSEPH R. CONWAY, ESQ. NANCY L. VALERY, ESQ.

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[TESTIMONY OF DETECTIVE
RICHARD SNEIDER]

[451]

DIRECT EXAMINATION

BY MR. KELLY:

Q. Good afternoon.

A. Good afternoon.

Q. Would you tell the jury where you are employed?

A. By the Suffolk County Police Department as a detective.

Q. And how long have you been employed there?

A. For 24 and a half years.

Q. And what is your current position?

A. I'm a detective with the First Squad detectives. I'm in a unit called the Narcotics Enforcement and Special Operations Unit, NESO.

[452]

Q. What is your current position in NESO?

A. Detective.

Q. And were you so employed on July 28th, 2005

A. Yes.

Q. What are your duties and responsibilities in that position?

A. We do investigations into narcotics, weapons, and special operations.

Q. And what area, geographic area does that cover?

A. I cover the Town of Babylon.

Q. And on July 28th, 2005, did you have occasion to come into contact with a — with any individual in particular?

A. Yes.

Q. And who was that?

A. Chunon Bailey.

Q. And prior to that, earlier in the day, did you come into contact with a Mr. Cannaday?

A. Yes, Raheem Cannaday.

Q. Now in connection with Chunon Bailey, what is your position in that investigation? Are you one of the detectives, are you the lead? What is your position?

A. I was the lead detective on this investigation.

Q. And was — and Detective Fischer, what was his position?

A. He was helping me with the investigation. He works [453] on my team.

Q. So you were in charge of the team involving this investigation?

A. Yes. I have a sergeant that is in charge, but I'm the leading detective.

Q. Who else was on the team that conducted the investigation?

A. Detective Gorbecki.

Q. And is Detective Gorbecki working currently?

A. No, he is not.

Q. What is his position?

A. He is out injured at this time.

Q. Now, in terms of that day, July 28th, 2005, tell us when, about, that day you came into contact with one Raheem Cannaday?

A. About 4:30 in the afternoon.

Q. And had you met him previously?

A. Yes.

Q. And tell the jury under what circumstances you met Raheem Cannaday previously.

A. He had been a confidential informant of mine several times prior.

Q. Well, characterize those several times prior, characterize the reliability of his information to the jury.

[454]

A. Raheem had worked with the police department on three prior occasions, and all weapons cases. And on three — on those three prior occasions we came up with a gun and made an arrest.

Q. Now, so, on July 28th, 2005, you had a conversation around 4:30 with Raheem Cannaday?

A. Yes.

Q. And where was that that you first ran into him?

A. At the First Precinct.

Q. And tell the jury what the circumstances were that Mr. Cannaday was in the precinct and what the discussion consisted of?

A. Mr. Cannaday was arrested in a stolen car. He was being charged with unauthorized use of a motor vehicle. And he wanted to talk to me, as he normally does when he gets arrested.

Q. Well, he had on three prior occasions; is that correct?

A. Yes.

Q. And over what period of time were these three prior occasions?

A. A year, a year and a half.

Q. Is it fair to say on each of the three prior occasions when he talked to you, he gave you some productive information and he received some benefit in the [455] situation he was facing before that?

A. Yes. I told him if whatever he told me worked out, I would tell the District Attorney's Office that he was cooperative and they would consider that.

Q. Now, what did you tell him on that date, July 28th, 2005, when he said he wanted to speak with you?

A. He was caught in a stolen car. He thought he was going to be arrested for grand larceny, which is a felony. It wasn't grand larceny. It was unauthorized use. And I led him to believe I would let the charge be dropped down to unauthorized use if he was cooperative. And that's a misdemeanor, and with a misdemeanor he could be bailed out in the precinct.

Q. At that point you didn't intend to charge him with the grand larceny auto?

A. No.

Q. So he was going to be charged with this unlawful use of a motor vehicle?

A. Unauthorized use.

Q. Unauthorized use, which is a misdemeanor?

A. Yes.

Q. Now, tell the jury what was said in conversation after that.

A. I asked him if he had any information that would be useful to me.

[456]

He told me that he knew somebody who had a gun.

Q. Had a gun?

A. Yes.

Q. And did he describe the gun for you, or tell the jury what else he told you?

A. He told me that he had bought six grams of crack cocaine from this person on the weekend.

While he bought it, he saw what he thought was a 380 chrome semi-automatic handgun on the kitchen table.

Q. And that was the weekend before —

A. Saturday or Sunday.

Q. He saw it on the kitchen table, or he saw it in his hand?

A. He told me he saw it on the kitchen table.

Q. All right.

And the kitchen table where?

A. In the apartment at 103 Lake Drive.

Q. And are you referring to a basement apartment at 103 Lake Drive?

A. Yes.

Q. And tell the jury what else that you remember Mr. Cannaday told you about this person?

A. He said he knew this individual by the nickname Polo. He didn't really know his name. He said he knew him for about two months and he had bought from him on six or [457] seven prior occasions. And some of those occasions occurred in Bay Shore.

Q. And anything else he told you at that point, Mr. Cannaday?

A. No, I believe that's all he told me at that time.

Q. Now, based on that conversation, did you proceed to seek a search warrant?

A. Yes.

Q. And you sought the search warrant from the District Court of Suffolk County; is that correct?

A. Yes.

Q. And did you obtain information for that search warrant from anyone besides Mr. Cannaday?

A. No.

Q. And what was the object of that search warrant?

A. A weapon.

Q. And did it specify what type of weapon?

A. Yes. It was a 380 caliber chrome handgun.

Q. And in that search did you find a chrome handgun?

A. Yes.

Q. And was it a 380?

A. It was a nine millimeter.

Q. And compare the appearance of a nine millimeter handgun and a 380 handgun to the jury.

A. You can't tell the difference between a 380 and a [458] nine millimeter. A 380 handgun is a short nine millimeter. It is the same — it is a round that is a little short.

Q. Are there appearances that are the same?

A. Yes.

Q. And if you can read the label, can you then determine which it is?

A. Yes.

Q. Now, in terms of that search warrant, could you tell the jury approximately what time you obtained that search warrant?

A. 8:45 p.m.

Q. And that's on July 28th, 2005, correct?

A. Yes.

Q. And at that point you had a general description of the person named — whom you knew as Polo who was said to be in possession of the chrome gun; is that correct?

A. Yes.

Q. And did you know anything about where he lived previously at that point?

A. Yes. Bay Shore.

Q. So you knew that Polo had previously lived in Bay Shore, and that was based on information from Mr. Cannaday?

A. Yes.

[459]

Q. And what description did you have at that point in general?

A. He was described as a dark skinned black male with stocky build and short hair.

Q. Now, after you obtained the search warrant at around 8:45 on July 28th, 2005, what did you do next?

A. I drove to the area where we had surveillance set up on the house with — where Detective Gorbecki and Detective Fischer were.

Q. And what did you do there?

A. I switched places with Detective Fischer. He took my car and I sat up on the house doing surveillance.

Q. When you say you sat up on the house, in the car that you were in, what was your view? What could you see from the vehicle where you were?

A. We were sitting just to the east of the house on Lake Drive. We were looking through a wooded area at the apartment gate, the fence on the side of the house, the right side of the house. And we could see the driveway up the front of the house.

Q. Did you have a clear view of the gate?

A. Yes.

Q. Tell the jury why you just characterized the gate to the basement apartment.

A. There is a gate on the right side of the house that [460] leads to the apartment. When you went into that gate, you went into a boxed area that just led to a set of stairs that went down to the apartment. Going through that gate, you couldn't go anywhere else except down to the apartment.

Q. Now, did there come a time when you were doing your surveillance when you observed individuals leave from the gate?

A. Yes.

Q. When was that — approximately when was that, and who was that?

A. At 9:56 p.m. I saw Chunon Bailey and Brian Middleton come out the gate and get into the black Lexus which was in the driveway.

Q. Now, the gate that you described, can you go through the gate and to the backyard?

A. No.

Q. Can you go anywhere except to the stairs leading to the basement apartment?

A. No.

Q. Now, what did you observe Mr. Bailey and Mr. Middleton do after you saw them go through the gate?

A. They got into the black Lexus in the driveway, and the black Lexus backed out of the driveway.

Q. Did you follow it immediately after it left the [461] driveway?

A. Gave it a few seconds lead and we followed after.

Q. Did you pull them over right away?

A. No.

Q. Explain to the jury why you didn't pull them over right away.

A. When we are executing a search warrant, we don't want to stop individuals that came out of the area to be searched right in front of their house due to the fact that the people inside may see us doing that. And then also that would endanger our Emergency Service — search warrant if we go after them right after that.

Q. This is a search warrant for weapons?

A. Yes.

Q. So your concern was one of safety; is that it?

A. Yes.

Q. Tell the jury how long you followed the Lexus containing Mr. Bailey and Mr. Middleton for.

A. We wanted the vehicle to get off the block, which is Lake Drive. And then we pulled them over. It was about a mile before we pulled them over on South 18th Street, behind the firehouse.

Q. You said the firehouse, the Wyandanch firehouse?

A. Yes.

Q. Now, this was done at night; is that correct?

[462]

A. Yes.

Q. And was this a fairly well lit area?

A. Yes.

Q. Were you the driver or passenger in the car following them?

A. I was the driver.

Q. And was that a marked police vehicle or unmarked car?

A. Unmarked car.

Q. So you pulled them over. And tell the jury what happened next after you pulled them over.

A. We stopped the car behind the firehouse. We both got out of the car and went up to the two sides of the car. I went up to the driver's side.

My partner, Detective Gorbecki, went to the passenger side.

I asked the driver, Chunon Bailey, to shut off the car, which he did. I asked him to get out of the car, which he did.

Q. Once he got to the rear of the vehicle, what happened then?

A. I told him to place his hands on the car, and I started to pat him down for weapons.

Q. And why were you patting down the driver — why were you patting down Mr. Bailey at this point?

A. Just to make sure he didn't have a weapon on him. It was a search warrant for weapons. I wanted to make sure [463] he had no weapons on him.

Q. A search warrant was just issued for the basement apartment and he had just left the basement apartment; is that correct?

A. Yes.

Q. And go ahead and tell the jury the results of the pat-down search on Mr. Bailey.

A. I patted him down and removed his wallet from his rear pocket, his right rear pocket, and I removed his keys from the left front pocket and put it in the back of the car on the trunk.

Q. Why did you remove those two objects? Explain to the jury what you look for when you do a pat-down search.

A. I look for anything that is a hard object that could possibly be a weapon.

Q. What happened next, after you removed the wallet and the keys?

A. Well, while I was doing that, I asked Mr. Bailey where he was coming from.

Q. When you asked Mr. Bailey where he was coming from, what was his response?

A. He said from my house.

Q. What else was said?

A. I asked him where his house was, and he said 103 Lake Drive.

[464]

Q. And after he said 103 Lake Drive, what happened next?

A. We started, after I asked him to show me some identification, he took his license out of his wallet.

Q. And did he show you his license?

A. Yes, he did.

Q. And what did his license indicate? Did it indicate that he was at — that he lived at 103 Lake Drive.

A. No, it did not.

Q. What did it indicate?

A. It indicated he lived in Bay Shore.

Q. Did that have any significance to you in connection with this investigation?

A. Yes, it did.

Q. Explain to the jury why the fact that Mr. Bailey's address had a Bay Shore address — license had a Bay Shore address had any significance to you in connection with the investigation.

A. The confidential informant, Raheem, had told me that the guy he bought from just — had lived in Bay Shore prior to moving in.

Q. Do you see the person you pulled over that night in this courtroom?

A. Yes.

Q. Could you identify him by a piece of clothing for the Court?

[465]

A. He is wearing the white shirt, and he is in the middle of the table there.

MR. CONWAY:

We concede the identification.

THE COURT:

Okay.

The record will reflect he identified the defendant.

MR. KELLY:

May I approach, your Honor?

THE COURT:

Yes.

Q. Placing before you Exhibit 63, do you recognize that?

A. Yes, it is a copy of the license he gave me.

MR. KELLY:

The government offers Exhibit 63 into evidence, your Honor.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Exhibit 63 is admitted.

(Whereupon, Government's Exhibit 63 was received in evidence.)

MR. KELLY:

May I publish it, your Honor?

THE COURT:

Yes.

(Whereupon, the exhibit/exhibits were published to the jury.)

Q. Can you tell the jury, after you gave him his license and you considered that, what happened next?

A. I handcuffed Mr. Bailey.

Q. And after you handcuffed Mr. Bailey, was there any discussion? Did you say anything to him?

[466]

A. While we were handcuffing him, Mr. Middleton was being handcuffed also. We were standing right next to each other in the back of the car. And Detective Gorbecki said to both of them,

you are not being arrested, you are just being detained.

Mr. Bailey asked, what am I being arrested for?

Again, we told him that he was not being arrested.

And after we had him handcuffed, we told him we were doing a search warrant at his house.

Q. Detective, going back to one question. You handcuffed the individuals and then you spoke to them about what was — why — that Detective Gorbecki said something about them being detained; is that correct?

A. Yes.

Q. And then they were told — someone said, either you or Detective Gorbecki, that a search warrant was being executed; is that what was said?

A. Yes.

Q. And that was at 103 Lake Drive?

A. Yes.

Q. Correct?

A. Yes.

Q. And that was the address which a minute or two previously Mr. Bailey had said he lived at?

[467]

A. Yes.

Q. Is that correct?

A. Yes.

Q. Once you gave Mr. Bailey, and Mr. Middleton was given that information, that a search warrant was being executed at 103 Lake Drive, Wyandanch, New York, was anything said by Mr. Bailey —

A. Yes he —

Q. — in response to that statement?

A. Yes, Mr. Bailey said, I'm not cooperating with you. I don't live there and anything you find there ain't mine.

Q. Now, in term of — are you paraphrasing, or are those the exact words? Do you have a clear recollection of this exchange in the back of the car?

A. I have a clear recollection, and I took notes on it as well.

Q. Now, at that point did then Mr. Bailey — did Mr. Bailey say something like why — why am I being detained, or why am I being arrested, or anything like that?

A. He had said that previous.

Q. And it was after that that Detective Gorbecki said something to the point that a search warrant was being executed at 103 Lake Drive?

A. Yes.

[468]

Q. And that is when Mr. Bailey mentioned the three statements, like I'm not cooperating with the investigation, I don't live there, and anything you find there isn't mine?

A. Yes.

Q. Now, there came a time, you said, when you took out — when you took the keys — that you took keys out of his pocket?

A. Yes.

Q. And did you say — where did you put them?

A. On the trunk of the car.

Q. And what happened — was it a key ring with a bunch of keys on it?

A. Yes.

Q. About how many?

A. Five or six.

Q. And what happened to those keys after that?

A. They were used to drive that vehicle, the Lexus, back to the house by Detective Gorbecki.

Q. And so at this point, Mr. Middleton and Mr. Bailey are in handcuffs?

A. Yes.

Q. And then the car that Mr. Bailey was operating, the Lexus, is transported back to where? The search location?

A. Yes, on Lake Drive.

[469]

Q. And why was it taken back to the search location at that point?

A. Umm, just for safekeeping. It is normal procedure.

Q. Safekeeping of the vehicle?

A. Yes.

Q. And when you arrived back at the search site, were you advised of certain findings that had been made by the Emergency Service team?

A. Yes.

Q. And tell the jury about that.

A. As soon as I arrived back, the warrant had been executed at that point in time, and I learned there was a gun and drugs now in open view in that apartment.

Q. And what steps did you take at that point with regard to Mr. Bailey and Mr. Middleton?

A. I didn't really take any steps. I just — at that point they were actually placed under arrest.

Q. And after that did you enter the apartment?

A. Yes.

Q. And just — in terms of the apartment, did you observe any contraband?

A. Yes, I did.

Q. Tell the jury what contraband you observed or found in the apartment.

A. In the bedroom area next to the bed, next to some [470] sneakers there was a black handgun laying on the floor. And on a bookcase by the TV I could see crack cocaine and cocaine, scales and drug paraphernalia.

MR. KELLY:

May I approach the witness, your Honor?

THE COURT:

Yes.

(Counsel approaches the witness stand.)

Q. Placing before you 51-A, 51-B in evidence.

Do you recognize those?

A. Yes.

Q. Looking at 51-A and 51-B, what are those?

A. 51-A are the drugs found on the bookcase.

Q And 51-B?

A. 51-B was found later on, it was found over by the TV, or over the TV.

Q. Now, you referred to a gun.

Do you recognize the weapon that is 53-A in evidence that I place before you?

(Handed to the witness.)

A. Yes.

Q. And tell the jury what you recognize this to be?

A. This is the black handgun that was by the sneakers.

Q. In the bedroom?

A. In the bedroom.

Q. Did you subsequently find another weapon, a handgun [471] in the apartment?

A. Yes.

Q. I'm placing before you the weapon in evidence as 52-A.

Do you recognize that weapon?

A. Yes, that's the gun we found between the mattresses and the box spring in the bedroom.

Q. Between the mattress and the box spring?

A. Yes.

Q. Now, did there come a time when you took the keys to the car and did something with the keys — the keys on the key ring, did you take the key ring with the five or six keys on it at some point?

A. Yes.

Q. And tell the jury what you did with — tell the jury what you did.

A. I at the very end of the search warrant, right before leaving, I took the keys and found what looked like a house key. And I tried it on the back door for the apartment to see if it would open the lock and the dead bolt, and it did.

Q. Did you then seize the key as evidence?

A. Yes. Yes, later on.

Q. Did you say one key fit both locks on the door?

A. Yes.

[472]

MR. KELLY:

May I approach the witness, your Honor?

THE COURT:

Yes.

(Counsel approaches the witness stand.)

Q. When you are speaking about the door, you are speaking about the door to the basement apartment at the bottom of those stairs?

A. Yes.

Q. Is that correct?

A. Correct.

Q. Now, placing before you 55 in evidence, do you recognize that?

A. Yes, it is the key I took.

Q. 55 is the key you took?

A. Yes.

Q. And the two locks that are part of 55, do you recognize that?

A. Yes, I do.

Q. And what are they?

A. They are the locks that I removed from the door.

Q. That evening, July 28th?

A. Yes.

Q. 2005?

A. Yes.

Q. And the — then did you log in a single key, [473] Exhibit 55, into that envelope?

A. Later on at the precinct logged — I took the key off the ring and logged in that single key in evidence.

Q. Now, you talked about invoicing the key, logging it in as evidence. What document do you use for that when you log in evidence?

A. The property section invoice.

Q. And you were the lead detective on this; is that correct?

A. Yes.

Q. And so did you prepare a group of property section invoices?

A. Yes.

MR. KELLY:

May I approach, your Honor?

THE COURT:

Yes.

(Counsel approaches the witness stand.)

Q. Placing before you two of them, Exhibits 7 and 8 for identification, do you recognize those?

A. Yes.

Q. And what are those?

A. These are two of the invoices that I did — that I produced that evening.

Q. And these invoices relate to items you're seizing; is that correct?

A. Yes, correct.

[474]

Q. And you signed these documents?

A. Yes.

Q. Now, going through them, the first one in front of you is exhibit 7; is that correct?

A. Yes.

MR. KELLY:

The government offers Exhibit 7 into evidence.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Exhibit 7 is admitted.

(Whereupon, Government's Exhibit 7 was received in evidence.)

Q. Can you tell the jury what was logged in by you in connection with Exhibit 7.

A. Two items. The first item was a clear plastic bag that contains a quantity of off-white rock-like substance. The second item is a clear plastic wrap and it contains a quantity of white powder substance.

Q. And would those be the bags that I just showed you with crack cocaine and powder cocaine in them?

A. Yes.

Q. If you go to Exhibit 8.

That was prepared the same way; is that correct?

A. Yes.

Q. It contains your signature, correct?

A. Yes.

[475]

MR. KELLY:

The government offers Exhibit 8 in evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 8 is admitted.

(Whereupon, Government's Exhibit 8 was received in evidence.)

Q. Tell the jury what was logged in in connection with Exhibit 8 into evidence.

A. Four items. Item number one was three Tanita, T-A-N-I-T-A, gram scales.

Item number two was a box containing clear sandwich bags from King Kullen.

Item number three was a ceramic plate.

Item number four was a razor blade.

Q. Are those items 59-D I'm holding up to you in evidence, 60-B, as in Billy, in evidence, 60-A, as Allen, in evidence, and 60-C, as in Charley, in evidence?

A. Yes.

Q. And if you look at Exhibit 9 and can you tell me if that followed the same procedure?

A. Yes, it did.

Q. Exhibit 9?

A. Yes.

MR. KELLY:

The government offers Exhibit 9.

MR. CONWAY:

No objection.

[476]

THE COURT:

Exhibit 9 is admitted.

(Whereupon, Government's Exhibit 9 was received in evidence.)

Q. And what item, seized item, was logged in under the property section invoice marked as Exhibit 9 in evidence?

A. It is one item. A clear plastic bag that contains a quantity of an off-white rock-like substance.

Q. And that turned out to be some of the drugs that I showed you previously?

A. Yes, the smaller bag.

Q. The smaller bag?

A. Yes.

Q. And showing you Exhibit 10. Do you recognize that?

(Handed to the witness.)

A. Yes.

Q. Is that a property section invoice created in the same way?

A. Yes, it is.

MR. KELLY:

The government offers Exhibit 10.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 10 is admitted.

(Whereupon, Government's Exhibit 10 was received in evidence.)

Q. And what was logged in as evidence under Exhibit 10?

A. Money. One $50 bill, eighteen $20 bills, one $10 [477] bill, one $5 bill and one $1 bill.

Q. And placing before you Exhibit 11, was that created the same way as the other property invoices?

A. Yes.

MR. KELLY:

We offer Exhibit 11.

MR. CONWAY:

No objection, your Honor.

THE COURT:

Exhibit 11 is admitted.

(Whereupon, Government's Exhibit 11 was received in evidence.)

Q. What was logged in under Exhibit 11?

A. Three items, the first one Highpoint firearm, serial number 421388, model JHP 45 ACP caliber semi-automatic handgun.

Item number two, magazine containing numerous rounds of ammunition for the above weapon.

Item three, one Winchester .45 caliber round removed from the chamber of the gun.

Q. So that refers — does that refer to the weapon that is 53-A in evidence?

A. Yes, it does.

Q. And looking at Exhibit 12, is that in front of you?

A. Yes, it is.

Q. And was that created in the same way as the prior property section invoices were created?

A. Yes.

[478]

MR. KELLY:

The government offers Exhibit 12 into evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 12 is admitted.

(Whereupon, Government's Exhibit 12 was received in evidence.)

Q. And tell the jury what you logged — what seized evidence was logged in under Exhibit 11.

A. Exhibit 12.

Q. Sorry, Exhibit 12.

A. Item number one, a black plastic bag that contains numerous assorted .45 caliber ammunition.

Q. Just one item on that one?

A. One item.

Q. And would that be Exhibit 58, a bag of bullets?

A. Yes.

Q. Look at Exhibit 13, is that created in the same way as the prior property section invoices?

A. Yes.

MR. KELLY:

We offer that Exhibit, 13, into evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 13 is admitted.

(Whereupon, Government's Exhibit 13 was received in evidence.)

[479]

Q. What was logged in under Exhibit 13 in evidence?

A. One item. A Highpoint firearms, serial number B 17611, model 995, nine millimeter rifle in a black nylon case.

Q. And do see that on the table over there, the rifle that's in evidence?

A. Yes.

Q. When I refer to the rifle in evidence, I'm referring to Exhibit 54 in evidence.

Now, if you look at the next property section invoice, which is 14 for identification. Do you see that?

A. Yes.

Q. And was that created in the same way as the prior property section invoices?

A. Yes.

MR. KELLY:

The government offers Exhibit 14.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 14 is admitted.

(Whereupon, Government's Exhibit 14 was received in evidence.)

Q. What seized items were logged into evidence under Exhibit 14, Detective?

A. One item. American Eagle box containing 23 nine millimeter rounds.

Q. And you see that item on the table being Exhibit 57?

[480]

A. Yes.

Q. You have Exhibit 15 in evidence before you?

A. Yes.

Q. What items did you log in in connection with Exhibit 15 in evidence?

THE COURT:

Do you want to offer it first?

MR. KELLY:

Your Honor, I believe it was previously admitted, Exhibit 15, yesterday.

MR. CONWAY:

Correct.

MR. KELLY:

This was the one invoice we admitted.

THE COURT:

I see it. Thank you.

MR. KELLY:

Yes.

A. Five items.

Q. Five items.

Would you go ahead and tell the jury what those items are?

A. Item number one, dead bolt lock.

Item number two, locking doorknob.

Item number three, assorted papers.

Item number four, serial number 23 KAH 89, IBM laptop computer with black case.

Item number five, key for the above locks.

Q. And does that reference the key and locks that are in front of you in Exhibit 55?

[481]

A. Yes.

Q. If you look at Exhibit 16, was that created in the same way as the prior personal property section invoices?

A. Yes, it was.

MR. KELLY:

The government offers Exhibit 16 into evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 16 is admitted.

(Whereupon, Government's Exhibit 16 was received in evidence.)

Q. Tell the jury what was seized and logged into evidence under Exhibit 16?

A. One item, a Paca, P-A-C-A, serial number 364413, protective body armor.

Q. And do you see that on the table over there, the body armor?

A. Yes.

Q. The one in evidence?

A. Yes.

Q. And if you look at the next Exhibit, it is 17?

A. Yes.

Q. And the body armor is Exhibit 56 in evidence.

Is 16 or 17 in front of you?

A. 17.

Q. Was Exhibit 17 created the same way as the prior [482] property section invoices?

A. Yes.

MR. KELLY:

The government offers Exhibit 17 into evidence.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 17 is admitted.

(Whereupon, Government's Exhibit 17 was received in evidence.)

Q. And what seized items were logged in under Exhibit 17 that is in front of you in evidence?

A. Three items.

Item number one, Bryco, B-R-Y-C-O, Arms, serial number 1549316 Jennings, nine millimeter semi-automatic handgun.

Item number two, magazine containing numerous rounds of ammunition for the above weapon.

Item number three is one nine millimeter Luger round removed from the chamber of the above weapon.

Q. And does that refer to Exhibits 52-A, B and C in evidence?

A. Yes.

Q. And what is a magazine for a gun?

A. It is the portion of the gun that holds the bullets.

Q. If you look at Exhibit 18 in front of you —

A. Yes.

[483]

Q. Was that created in the same way as the prior property section invoices?

A. Yes.

MR. KELLY:

And the government offers Exhibit 18 into evidence.

MR. CONWAY:

No objection.

THE COURT:

18 is admitted.

(Whereupon, Government's Exhibit 18 was received in evidence.)

Q. And tell the jury, detective, what seized items were logged into evidence?

A. Five items.

Number one was a Pyrex glass measuring cup.

Item two is strainers, two of them.

Item number three is a knife.

Item number four is a spoon.

And item number five is a hand mixer.

Q. Explain to the jury this procedure, your logging things in received pursuant to a search warrant, seized pursuant to a search warrant.

A. Anything we take during the search warrant, we log in as evidence at the end of the search warrant.

MR. KELLY:

Your Honor, may I publish these to the jury?

THE COURT:

Yes.

[484]

MR. KELLY:

Exhibits 7 through 18.

THE COURT:

Okay.

(Whereupon, the exhibit/exhibits were published to the jury.)

MR. KELLY:

May I have a moment, your Honor?

THE COURT:

Yes.

(Whereupon, at this time there was a pause in the proceedings.)

Q. The cash that was referenced moments ago as being on an invoice, where was that recovered from?

A. From the person of Chunon Bailey.

MR. KELLY:

Your Honor, the government offers the cash into evidence, that is 61 in evidence, your Honor.

MR. CONWAY:

No objection.

THE COURT:

Exhibit 61 is admitted.

(Whereupon, Government's exhibit 61 was received in evidence.)

Q. Looking at Exhibit 61, is this the cash that you seized from the person of Mr. Bailey that night?

A. Yes.

Q. Detective, did you also find documents there?

A. Yes.

Q. And old mail and pay stubs and things like that?

A. Yes.

[485]

Q. And take a moment, detective, to look at Exhibits 62-G, 62-H, 62-E, 62-E, 62-D, 62-B in evidence.

(Handed to the witness.)

(Whereupon, at this time there was a pause in the proceedings.)

Q. Have you taken a look at those?

A. Yes, I have.

Q. And do you recognize those?

A. Yes.

Q. And tell the jury what those are.

A. These are the — the items themselves or copies of the items of the personal papers we found at 103 Lake Drive.

Q. Was this also seized, 62-A, a Resorts International ID?

A. Yes.

Q. How many weapons investigations have you been involved in, detective?

A. Hundreds.

Q. Over the last 24 years?

A. Yes.

Q. And in those investigations, when illegal guns were found, did you attempt to trace the original owners of the guns?

A. Yes.

[486]

Q. And tell the jury about that in terms of gun tracings, and we all understand when you change a car, title moves from one person to another, and it is reported.

Explain to the jury what information is available on a gun.

A. A gun can usually be traced to the original buyer of the gun through what is called a buyer arms tracing form. And the ATF, the Federal Bureau, does the trace. They can tell you who the original owner of the gun was and where it was purchased.

Q. And in those investigations that you have been involved in, in the hundreds of investigations over the last 24 years, where illegal guns were found, did you attempt to trace the original owner of the guns in those situations, guns which were seized?

A. Yes. It is part of our procedure, yes.

Q. With what results?

A. A gun never comes back to the person who has the gun with the drugs.

Q. Now, in this case did you take steps to trace the original owner of the guns?

A. Yes.

Q. And the guns, of course, I'm referring to the two loaded handguns you just looked at that are in evidence.

[487]

Tell the jury about that, what steps you took to trace the original owner of the gun.

A. The — as I said, the firearms tracing form was filled out. It was sent to the ATF. They sent the report back to me saying that the guns were purchased by two people down in North Carolina.

Q. And were any of those guns traced out of North Carolina?

A. No. The only thing they can tell me is they were purchased down there by two people down in North Carolina.

Q. In terms of the weapons — did one of the guns get traced — did the investigation contain information that one of the guns came to Long Island at some point?

A. Yes.

One of the guns — a follow-up investigation was done with those people who bought those guns originally. One of the gentlemen who bought the guns said he was going to move up to Long Island. He had the gun shipped up here, or he brought it up here in a box. And he thought the gun was still in someone's house up here in that box.

Q. Now, in the hundreds of weapons investigations you have been involved in over 24 years, how many times have you recovered firearms and sent them to the lab for fingerprints?

A. Every time.

[488]

Q. And that would be hundreds of times?

A. Yes.

Q. And tell the jury how many times they have come back with prints on them?

A. Once.

Q. Now, in terms of a search that was carried out at the residence, tell the jury, in terms of searching boxes, there came a time that you were searching some boxes there at the residence; is that correct?

A. Yes, on the kitchen table.

Q. Tell the jury what the purpose of searching the boxes was for?

A. The same purpose I had for searching the entire apartment. We were looking for weapons.

Q. So, you were searching the weapons — the boxes primarily for weapons?

A. Yes.

Q. Now, in that search did you seize documents with identifying information on them such as the ones I just presented to you, Exhibit 62?

A. Yes.

Q. Did you seize documents with Chunon Bailey's name on them?

A. Yes.

Q. Did you seize all the documents with Chunon Bailey's [489] name on them?

A. No.

Q. Why not?

A. Umm, in the regular course of doing a search warrant, we just take whatever documents — whatever names we find at the house. We don't take every document. We just take some of the documents that are there.

Q. Did you see any documents there with identifying information from anyone besides Chunon Bailey?

A. No.

Q. What is the street name for cocaine in base form?

A. Crack.

Q. Now, getting back to the car stop you made for a moment, of Mr. Middleton and Mr. Bailey, there were two people, and those were the two people in the car, is that correct?

A. Yes.

Q. And you learned — how did you learn Mr. Middleton's identity?

A. He showed an identification card also.

Q. And did you learn the relationship between the two?

A. Yes. They were friends.

*****

[509]

[CROSS-EXAMINATION BY MR. CONWAY]

Q. And you got there approximately 9:45 or so?

A. Yes.

Q. And that surveillance — let me back up.

You relieved Detective Fischer at that point; is that correct?

A. Yes.

Q. And Detective Fischer and Detective Gorbecki had been there earlier, is that correct?

A. Yes.

Q. Now, when you took over for Detective Fischer, there was a black Lexus in the driveway, correct?

A. Yes.

Q. And it was black and not reddish; is that correct?

A. Black.

Q. While you were on surveillance, did you check the license plate of that black Lexus?

A. Yes.

Q. And did you do a license check, so to speak?

A. I don't recall. I did not at the time I was there. They may have done it earlier. I don't know.

Q. Is it fair to say that a license check on that plate, on that black Lexus, did not come back to the address 103 [510] Lake Drive, Wyandanch, New York; is that correct?

MR. KELLY:

Objection.

THE COURT:

Sustained.

Q. Do you know who in fact did a license plate check on that car?

MR. KELLY:

Objection.

THE COURT:

Overruled.

Q. Do you know if someone else did a license plate check?

THE WITNESS:

I do not. I assume Detective Gorbecki or Fischer did it when they were there earlier.

Q. So you assume and you are not even sure if it was done?

A. I'm not.

Q. Okay.

*****

[515]

Q. Now, there came a time you saw two individuals enter a black Lexus; is that correct?

A. Yes.

Q. At that point you didn't know the identity of either individual; is that correct?

A. Correct.

Q. And they got into the Lexus and proceeded to leave the 103 premises?

A. Yes.

Q. And after a small amount of time you followed?

A. Yes.

Q. As you were following them, did either you or [516] Detective Gorbecki do a check on the plate to see who the car came back to?

A. No. We weren't close enough to do that.

Q. Okay.

During the course of this case, during the investigation, did you ever run a plate check on that black Lexus?

A. Yes.

Q. Is it fair to say that the plate check came back to an address different than 103 Lake Drive?

A. Yes.

Q. Isn't it a fact that it came back to a Bay Shore address?

A. I'm not sure. I'll take your word for it.

Q. We will leave it at that.

MR. KELLY:

Again, your Honor, the government moves to strike the comment.

THE COURT:

The jury will ignore the comment.

Mr. Conway, just ask the questions, okay?

Q. Now, there came a time you stopped Mr. Bailey; is that correct?

A. Yes.

Q. Isn't it a fact when you stopped him, he told you he resided in Bay Shore?

A. No.

[517]

Q. Did he produce a license at the time of his stop?

A. Yes.

Q. Is it fair to say that that license indicated a Bay Shore address?

A. Yes.

Q. I'm showing you a copy of Government's Exhibit 63.

(Handed to the witness.)

Q. That's the license produced that evening?

A. Yes.

Q. And it does contain the Bay Shore address; is that correct?

A. Correct.

Q. Did you do any investigation to determine if Mr. Bailey lived at that address?

A. No.

Q. Did you ever go to the premises to see if he resided there?

A. No.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CR 06-232

UNITED STATES OF AMERICA

v.

CHUNON BAILEY, Defendant

November 3, 2006
9:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE,
and a jury

APPEARANCES:

For the Government:	ROSLYNN R.MAUSKOPF United States Attorney 100 Federal Plaza Central Islip, New York 11722 By: CHARLES P. KELLY, ESQ. MANU CHADDA, ESQ. Assistant U.S. Attorneys
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[TESTIMONY OF BRYANT MIDDLETON]

*****

[665]

[DIRECT EXAMINATION BY MR. CHADDA]

Q. When you guys went inside, could you describe — when I say "you guys," you and the defendant.

When you went inside that basement apartment that day, describe what you did.

A. Went inside, went downstairs, a long hallway. Another door was opened; we walked in. It was dark. I said I seen some boxes.

I stood there because I never just sit down. I [666] waited for him to seat me. And he told me to have a seat right here.

Q. When you say "right here," where did he say to have a seat?

A. It was right in the doorway, the living room. Right by the doorway to the living room and bedroom — excuse me. I apologize. The kitchen and the bedroom. It wasn't the living room. I apologize.

Q. And Mr. Middleton, could you describe to the jury at that point, once you were inside, what happened?

A. Still playing the basketball game.

Q. On the PlayStation?

A. Yes.

Q. Same game you played in the Bayshore apartment?

A. Basically basketball.

Q. That same game you played with him on the PlayStation in the Bayshore apartment you are now playing with him in the Lake Drive apartment, right?

A. The basketball game, yes.

Q. And I want you to describe for us what you were doing after you played the basketball game.

A. I asked him could I use the bathroom. I said it was 10 o'clock. I was on parole. It was before 10 o'clock. I said I had to be home by 10:00, and I had to use the bathroom. And he said, Go ahead.

[667]

Q. You mentioned to us that you assumed that that was his apartment, right?

A. Yes.

Q. Is that also because he never said that that apartment belonged to anyone else?

A. No, never said that.

Q. He never said, Hey, we're going to my friend Bill's place to go hang and play PlayStation?

A. No.

Q. He never said, Let's go to my place; this place belongs to someone else? He never said that?

A. No.

Q. He acted like that was his home; isn't that right?

MR. CONWAY:

Objection.

THE COURT:

Sustained as to form.

BY MR. CHADDA:

Q. Now, Mr. Middleton, you mentioned there came a time when you left.

A. Yes.

Q. Could you describe how you left the apartment?

A. I left first, because I used the bathroom, and then I said, I'm going outside. As a matter of fact, I said I was walking home, to be honest. And I said, I was going outside.

As I was leaving, he said, No. He offered me to [668] drive him home [sic].

I told him, No, it's not a far walk.

He said, No, it's all right. I'll drive you home. It's all right.

And he opened his door from the car.

Q. And you walked out of that gate?

A. I would think so.

Q. You walked out of that gate together?

A. No, I kind of left first.

Q. And did there come a time he was there with you?

A. Yes.

Q. Walking towards the car?

A. Yes.

Q. And did you get in the car?

A. I got in the car. He opened it. He had a little gadget. Opened the door and sat in the car.

Q. What kind of car was that that the defendant drove?

A. It was a black Lexus.

Q. Could you describe the inside of that car?

A. Gray. I think it gray leather material.

Q. What —

A. Not gray, beige. I apologize. Beige.

Q. Now, did you recognize — before you had left and gotten into that car — I'm sorry to take you back, Mr. Middleton.

[669]

Did you recognize any of the items in the Lake Drive apartment?

A. Just boxes. It was boxes on tables, boxes just stacked up. I saw a lot of boxes.

Q. Looked like somebody just moved in?

A. Probably.

Q. Yeah.

Mr. Middleton, when you get in the car, could you describe what happens after you get in the car with the defendant.

A. Yeah. We get in the car, and he just backs out and proceeds to take me to my house.

Q. Describe what happened to the jury at that point.

A. When we reached Straight Path and 18th Street, we made a left and was pulled over by the firehouse.

Q. When you say "pulled over," can you describe to the jury how it happened?

A. I don't know. We were kind of just listening to music and just seeing sirens, seeing the lights from the sirens.

[TRIAL EXHIBIT 64]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CR 06-232

UNITED STATES OF AMERICA

v.

CHUNON L. BAILEY, also known as POLO,
Defendant

STIPULATION RE CERTAIN ISSUES

IT IS HEREBY STIPULATED AND AGREED, by and between the United States of America, by Roslynn Mauskopf, United States Attorney for the Eastern District of New York, Charles P. Kelly, Assistant United States Attorney, of counsel and the defendant Chunon L. Bailey, by and with the consent of his attorney Joseph R. Conway, as follows:

1. Both parties agree that some of the items found in the basement apartment of 103 lake drive upon the execution of a lawful search warrant on July 28, 2005, including but not limited to two loaded handguns (Exhibits 52a, b and c and 53a, b and c), ammunition (Exhibits 57 and 58 in evidence), illegal drugs including 40.87 grams of crack cocaine and 39.99 grams of powder cocaine packaged in the way they are in evidence (Exhibits 51a and 51b in evidence), gram scales (Exhibit 59d in

evidence), strainers (Exhibit 59a in evidence), knife, spoon and hand mixer (Exhibit 59c in evidence), razor blade (Exhibit 60c in evidence), box of plastic bags (Exhibit 60b in evidence) are tools of the trade of drug trafficking ("tools of the trade").

2. Specifically, that the items pyrex measuring cup (Exhibit 59b in evidence), strainers (Exhibit 59a in evidence), knife, spoon and hand mixer (Exhibit 59c in evidence), the razor blade (Exhibit 60c in evidence), the ceramic plate (Exhibit 60a in evidence), box of sandwich bags (Exhibit 60b in evidence) and gram scales (Exhibit 59d in evidence) are used to make, sell and package illegal drugs such as powder cocaine and crack cocaine (Exhibit 51a and 51b in evidence). And that when found nearby those materials, loaded guns (Exhibits 53a and 52a) and ammunition (Exhibit 57 and 58 in evidence) are used by the one making and selling the drugs to protect his illegal drugs and himself.

3. The amount of crack cocaine found in the apartment, 40.87 grams, when considered together with the tools of the trade detailed in number "1" above, is consistent with what a drug dealer/seller would possess for distribution, and inconsistent with what would be for one's personal use.

IT IS FURTHER STIPULATED AND AGREED THAT this Stipulation may be received in evidence as a Government Exhibit at trial.

Dated: November 2, 2006
Central Islip, New York

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By: /s/
JOSEPH R. CONWAY, ESQ.

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PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 3 - 2012
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No. 11-770

In the Supreme Court of the United States

CHUNON L. BAILEY, A/K/A POLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, pursuant to *Michigan* v. *Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed.

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395 U.S. 752 (1969) 17, 36, 37, 38
City of Indianapolis v. *Edmond*, 531 U.S. 32 (2000) 15
Commonwealth v. *Charros*, 824 N.E.2d 809 (Mass.),
cert. denied, 546 U.S. 870 (2005) 32
Coolidge v. *New Hampshire*, 403 U.S. 443 (1971) 37
County of Riverside v. *McLaughlin*,
500 U.S. 44 (1991) 13
Dunaway v. *New York*, 442 U.S. 200 (1979) 13
Henry v. *United States*, 361 U.S. 98 (1959) 13, 37
Illinois v. *Caballes*, 543 U.S. 405 (2005) 14
Illinois v. *Wardlow*, 528 U.S. 119 (2000) 23
Johnson v. *United States*, 333 U.S. 10 (1948) 31
Kolender v. *Lawson*, 461 U.S. 352 (1983) 19
Leveto v. *Lapina*, 258 F.3d 156 (3d Cir. 2001) 24, 32
Los Angeles County v. *Rettele*, 550 U.S. 609 (2007) 17
Maryland v. *Buie*, 494 U.S. 325 (1990) 36
Michigan v. *Summers*, 452 U.S. 692 (1981) ..... *passim*
Miranda v. *Arizona*, 384 U.S. 436 (1966) 16
Muehler v. *Mena*, 544 U.S. 93 (2005) ..... *passim*
New York v. *Belton*, 453 U.S. 454 (1981) 17, 21, 39
Terry v. *Ohio*, 392 U.S. 1 (1968) ..... *passim*
Thornton v. *United States*,
541 U.S. 615 (2004) 25, 27, 39, 40
Trupiano v. *United States*, 334 U.S. 699 (1948) 31
United States v. *Bohannon*,
225 F.3d 615 (6th Cir. 2000) 24
United States v. *Burns*, 37 F.3d 276 (7th Cir. 1994),
cert. denied, 515 U.S. 1149 (1995) 16

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Cases—continued:

United States v. *Davis*, 530 F.3d 1069 (9th Cir. 2008) 16
United States v. *Jennings*,
544 F.3d 815 (7th Cir. 2008) 24
United States v. *Kirschenblatt*,
16 F.2d 202 (2d Cir. 1926) 38
United States v. *Rabinowitz*, 339 U.S. 56 (1950) 36
United States v. *Reinholz*, 245 F.3d 765 (8th Cir.),
cert. denied, 534 U.S. 896 (2001) 25
United States v. *Robinson*, 414 U.S. 218 (1973) 17
United States v. *Sanchez*, 555 F.3d 910 (10th Cir.),
cert. denied, 556 U.S. 1145 (2009) 29
United States v. *Sharpe*, 470 U.S. 675 (1985) 14
Wilson v. *Layne*, 526 U.S. 603 (1999) 19

Constitution and statutes:

U.S. Const. Amend. IV ..... *passim*
U.S. Const. Amend. V 15
18 U.S.C. 922(g)(1) 5
18 U.S.C. 924(a)(2) 5
18 U.S.C. 924(c)(1)(A)(i) 5
18 U.S.C. 3500 21
21 U.S.C. 841(a)(1) 5
21 U.S.C. 841(b)(1)(B)(iii) 5
28 U.S.C. 1254(1) 1
28 U.S.C. 2255 7

Miscellaneous:

Amir Hatem Ali, Note, *Following the Bright Line 'Michigan v. Summers,'*
45 Harv. C.R.-C.L. L. Rev. 483 (2010) 19
Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*,
45 U. Pitt. L. Rev. 227 (1984) 24
Boston Police Department, *Rules and Procedures*,
Rule 334 (June 14, 2006)
<tinyurl.com/bostonrule334> 23

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Miscellaneous—continued:

Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted* tbl. 19 (2010) <tinyurl.com/fbi2010table> 26
Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 Just. Q. 607 (1997) 24
Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 Soc. Probs. 1 (1997) 24
Wayne R. LaFave, *Being Frank About the Fourth*, 85 Mich. L. Rev. 427 (1986) 36
Wayne R. LaFave, *Search and Seizure* (4th ed. 2004) 35, 39
William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393 (1995) 38
The Works of John Adams (Charles Francis Adams ed. 1850) 37

In the Supreme Court of the United States

No. 11-770

CHUNON L. BAILEY, A/K/A POLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 652 F.3d 197. The court of appeals' order denying rehearing (Pet. App. 21a) is unreported. The order of the district court denying petitioner's motion to suppress (Pet. App. 22a-57a) is reported at 468 F. Supp. 2d 373.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on September 20, 2011 (Pet. App. 21a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

In *Michigan* v. *Summers*, 452 U.S. 692 (1981), the Court adopted the categorical rule that officers executing a search warrant for contraband may detain the occupants of the premises while the search is conducted. This case presents the question whether the rule of *Summers* extends to the detention of a former occupant who has left the immediate vicinity of the premises before the warrant is executed.

In this case, officers followed petitioner from the apartment to be searched and detained him approximately a mile away. During the detention, the officers discovered a key to the apartment on petitioner's person, and petitioner made statements linking himself to the apartment. In the course of the search, officers found guns and drugs, and petitioner was later charged with various federal offenses. The district court denied petitioner's motion to suppress the fruits of his detention, Pet. App. 22a-57a, and petitioner was convicted. The court of appeals affirmed, holding that the rule of *Summers* extends to the detention of a former occupant who has left the immediate vicinity of the premises. *Id.* at 1a-20a. The court of appeals' holding was incorrect, and its judgment should be reversed.

1. At 8:45 p.m. on Thursday, July 28, 2005, Officer Richard Sneider of the Suffolk County, New York, police department obtained a warrant to search the basement apartment of a house at 103 Lake Drive in the hamlet of Wyandanch. The warrant identified a .380-caliber handgun as the principal object of the search. The warrant application was based entirely on a tip provided a few hours earlier by a confidential informant, a serial offender who had been picked up for driving a stolen car. The informant claimed that he had seen the gun the previous weekend, when he had been at the apartment to purchase drugs from "a heavy set black male with short hair" known as "Polo." J.A. 16-26, 81-83, 186-187; Pet. App. 3a, 23a.

Shortly before the warrant issued, two other officers, Daniel Fischer and Richard Gorbecki, arrived at the house in an unmarked car. They parked nearby and began surveilling the property. After obtaining the warrant, Officer Sneider arrived on the scene and swapped places with Fischer. All search warrants in Suffolk County are executed by an Emergency Services Unit, the functional equivalent of a Special Weapons and Tactics (SWAT) team. While Sneider and Gorbecki continued to surveil the property, Fischer met with the Emergency Services Unit and an additional team of officers on hand to conduct the actual search. J.A. 34-45, 61-67, 82-84, 95-100, 121-125; Pet. App. 3a, 24a.

Around 9:56 p.m., Officers Sneider and Gorbecki observed two men coming out from a gate at the top of stairs to the basement (through which there was access both to the basement apartment and, via a connecting door, to the upstairs portion of the house). The two men were petitioner and another individual, Bryant Middleton; both men fit the generic description of "Polo" provided by the informant. The officers watched as the men

got into a car and drove away, with petitioner behind the wheel. There is no indication that the men were aware of the officers' presence at the time they left the scene; Middleton later told the police that petitioner was driving him home because he was subject to a 10 p.m. parole curfew. J.A. 45-47, 55, 66-69, 83-85, 99-103; Pet. App. 3a-4a, 24a.

Officers Sneider and Gorbecki called Officer Fischer to inform him that they intended to follow and detain the men. Shortly after getting the call, Fischer led the entry and search teams from the staging area to execute the warrant. After the car was a couple hundred yards down the street, Sneider and Gorbecki began following it. In order to avoid alerting the men to their presence, the officers initially did not turn on their headlights. The officers followed the men for approximately a mile; during that time, they observed the car proceeding through two traffic lights and two stop signs, and making multiple turns, without any traffic infractions. J.A. 46-50, 68-72, 85-86, 101-105, 126-127; Pet. App. 4a, 24a.

About five minutes after leaving the scene, the officers pulled over the car in a well-lit area next to the Wyandanch fire station. The officers ordered the men to get out of the car and conducted a pat-down search of each man. Although the officers found no weapons or contraband, they found and seized petitioner's keys, which, according to the officers, he had placed in his pants pocket after the initial stop. Officer Sneider proceeded to question petitioner; when Sneider asked petitioner where he was coming from, he said he was coming from his house at 103 Lake Drive. But when Sneider asked for identification, petitioner produced a driver's license with an address in Bay Shore, a hamlet several miles away. J.A. 48-56, 72-76, 86-89, 105-111; Pet. App. 4a, 25a.

The men were then handcuffed. When petitioner asked why they were being arrested, Officer Gorbecki told him that they were not under arrest, but instead were being detained incident to the execution of a search warrant at 103 Lake Drive. In response, petitioner said: "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your investigation." J.A. 56-58, 75-79, 90-91, 110-111; Pet. App. 4a-5a, 26a.

Officers Sneider and Gorbecki then called for backup; additional officers arrived in a marked police car and transported petitioner and Middleton back to 103 Lake Drive. Sneider drove the unmarked car back, and Gorbecki drove petitioner's car. By the time the cars returned to the scene, the Emergency Services Unit had entered and secured the apartment and observed a gun and drugs in plain view. Petitioner and Middleton were then formally placed under arrest. Officers later found two additional guns in the apartment, along with ammunition and drug-related paraphernalia; none of the guns was a .380-caliber handgun. Officers also discovered that one of the keys seized from petitioner during the detention opened the door of the apartment. J.A. 27-28, 58-60, 72, 91-93, 111-115, 132-165; Pet. App. 5a, 26a-27a.

2. On April 6, 2006, a grand jury in the Eastern District of New York indicted petitioner on one count of possessing at least five grams of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii); one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Petitioner moved to suppress the key and his statements on the ground, *inter alia*, that they constituted the fruits of an invalid detention under the Fourth Amendment.

The district court denied petitioner's motion to suppress. Pet. App. 22a-57a. As is relevant here, the court held that, although petitioner had been detained after leaving the immediate vicinity of the apartment, his detention was justified under *Summers* as a valid detention incident to the execution of a search warrant. *Id.* at 28a-35a. The court determined that, "because [petitioner] was observed leaving the basement apartment at 103 Lake Drive that was about to be searched pursuant to a warrant, the police had the legal authority under *Summers* to detain [him] for a reasonable period during the execution of the search." *Id.* at 28a.

The district court rejected petitioner's contention that *Summers* was "inapplicable to the instant case because [he] was not detained at the residence, but rather was followed a few blocks by police from the residence before he was detained." Pet. App. 28a-29a. In the court's view, "the holding and rationale of [*Summers*] apply with equal force when, for officer safety reasons, police do not detain the occupant on the curbside, but rather wait for him to leave the immediate area and detain him as soon as practicable." *Id.* at 34a n.4.

3. The case proceeded to trial. There, the central issue was whether petitioner had been in possession of the guns and drugs that were the subject of the indictment. In attempting to link petitioner to those items, the prosecution presented no forensic evidence, nor any evidence concerning the registration of the guns. Instead, the prosecution heavily relied on the fruits of the detention—the key and petitioner's statements—as evidence that petitioner was living at the apartment. See, *e.g.*, Tr. 26-28, 36-38 (Nov. 6, 2006). For its part, the defense presented the testimony of the house's owner, who testified that, at the time, she was renting the apartment not to petitioner but to another man. See *id.* at 77-78.

After three days of deliberation—in the course of which the jury asked the judge to reread the instructions defining reasonable doubt and possession, Tr. 857 (Nov. 7, 2006)—the jury found petitioner guilty on all three counts. The district court sentenced petitioner to 30 years of imprisonment, to be followed by five years of supervised release. Pet. App. 1a-2a.

4. The court of appeals affirmed petitioner's conviction, rejecting the contention that his detention was invalid under *Summers*. Pet. App. 1a-20a.[1]

At the outset, the court of appeals correctly noted that, under *Summers*, "the detention of 'occupants' even without individualized suspicion during the execution of a valid search warrant is reasonable under the Fourth Amendment." Pet. App. 9a. In addition, the court of appeals correctly recognized that this case presented a question not answered by *Summers*: namely, "whether the same authority pursuant to which police officers may detain an occupant *at* the premises during the execution of a search warrant permits them to detain an occupant who *leaves* the premises during or immediately before the execution of a search warrant and is detained a few blocks away." *Id.* at 10a.

After cataloguing a circuit conflict on the question, the court of appeals sided with those courts that "ha[d] extended *Summers* on facts similar to those of this case." Pet. App. 10a. According to the court of appeals, "[t]he

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[1] After petitioner was convicted, he filed a motion to vacate sentence under 28 U.S.C. 2255, raising a single claim of ineffective assistance of counsel. The district court denied that motion, and petitioner appealed. The court of appeals consolidated that appeal with petitioner's direct appeal and, in the decision under review, affirmed the denial of the Section 2255 motion. See Pet. App. 17a-19a. Petitioner is not challenging that aspect of the court of appeals' decision.

guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the preservation of evidence." *Id.* at 13a. "[I]t is the very interests at stake in *Summers*," the court suggested, "that permit detention of an occupant nearby, but outside of, the premises." *Id.* at 14a.

The court of appeals contended that a contrary rule "would put police officers executing a warrant in an impossible position." Pet. App. 14a. The court explained that, when officers observed someone leaving a place to be searched, "they would be required either to detain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered)." *Ibid.*

The court of appeals acknowledged that "*Summers* imposes upon police a duty based on both geographic *and* temporal proximity." Pet. App. 15a. Like the district court, however, the court of appeals refused to draw a "bright line" around the premises to be searched. *Id.* at 13a. Instead, it concluded that "*Summers* authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected *as soon as reasonably practicable*." *Id.* at 19a.[2]

5. The court of appeals subsequently denied rehearing. Pet. App. 21a.

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[2] In light of its holding that petitioner's detention was justified under *Summers*, the court of appeals expressly declined to consider whether the detention could alternatively be justified under *Terry* v. *Ohio*, 392 U.S. 1 (1968). See Pet. App. 16a n.7.

SUMMARY OF ARGUMENT

The court of appeals in this case erred when it extended the categorical rule of *Michigan* v. *Summers*, 452 U.S. 692 (1981), to the detention of a former occupant who has left the immediate vicinity of the premises to be searched before the warrant is executed.

A. The *Summers* rule constitutes a narrow exception to the default Fourth Amendment principle that the seizure of a person is valid only if it is based on probable cause. In *Summers*, the Court held that officers executing a search warrant for contraband have the authority to detain the occupants of the premises while the search is being conducted. The Court articulated two primary justifications for that rule: first, that such detentions are necessary to minimize the risk of harm to the officers executing the warrant, and second, that such detentions serve to facilitate the orderly completion of the search.

B. In this case, the court of appeals extended the *Summers* rule. The Court repeatedly emphasized in *Summers* that it was establishing a rule that governed the detention of the occupants of the premises—not the detention of a former occupant who has left the scene entirely before the search begins. As this case illustrates, the latter type of detention meaningfully differs from the former; in fact, it cannot comfortably be said to be incident to the execution of the search warrant at all. One set of officers followed petitioner from the apartment to be searched for approximately a mile, and then detained him at the same time as different teams of officers executed the search warrant back at the apartment. In addition, whereas *Summers* involved the detention of an individual in the privacy of his own home, the officers in this case detained petitioner in full public view for several minutes before handcuffing him and

transporting him in a marked police car back to the apartment.

C. The court of appeals' extension of the *Summers* rule to this case was erroneous. Under the methodology set out in cases such as *Arizona* v. *Gant*, 556 U.S. 332 (2009), the relevant inquiry is whether the justifications supporting the categorical rule of *Summers* apply with the same or similar force to detentions that occur away from the immediate vicinity of the premises to be searched. They do not. Most notably, an individual who has left the premises before the warrant is executed presents minimal risk, if any, to the officers executing the warrant. An individual who is not present at the scene poses no threat of sudden violence to the officers; indeed, as in this case, such an individual will ordinarily have no reason to know that a search is imminent. Similarly, the detention of such an individual does not materially advance the interest in facilitating the orderly completion of the search. An individual who is not present cannot interfere with the search by destroying or concealing evidence or distracting officers from the task at hand.

The government's contrary argument relies on the possibility that an individual who has left the premises will be tipped off about the search and come storming back to thwart it. That highly speculative possibility does not justify extension of the *Summers* categorical rule. And the government's argument proves far too much, because it would seemingly justify the detention of any persons associated with the premises to be searched, on the theory that they could learn about the search—regardless of whether those persons have been seen leaving the scene and regardless of where they are found. *Summers* does not create a police entitlement to

conduct detentions under any circumstances. Yet that is the inevitable implication of the government's position.

In *Summers*, the Court also noted that the government has a legitimate interest in preventing flight in the event that incriminating evidence is found. Standing alone, that interest cannot support extension of the *Summers* rule. A contrary understanding would authorize detentions based simply on the hope that the ensuing search will *produce* probable cause, notwithstanding the default rule that detentions *require* probable cause. In any event, the probability that an individual who has left the scene will learn of the search is slight, and officers have less intrusive means at their disposal for ensuring that such an individual will not flee. The mere fact that it may be convenient to have persons associated with the premises close at hand in the event incriminating evidence is found does not justify a detention in the absence of individualized suspicion; the Fourth Amendment does not authorize anticipatory arrests based on officer convenience.

D. In addition, the detention of a former occupant who has left the immediate vicinity of the premises to be searched is more intrusive than a detention covered by the *Summers* rule. Where the initial seizure occurs in a public place away from the premises, it produces almost all of the indignity of a full-fledged arrest. The individual is likely to be detained in full public view for at least several minutes, and, where officers decide to return the individual to the scene, he is likely to be subjected to the additional indignities of being placed in handcuffs and being transported in a police car. The potential for exploitative questioning is also far greater, because the officers conducting the detention will inevitably be focused on the detained individual rather than on the search.

E. Finally, the court of appeals' standard, under which the detention of a former occupant who has left the scene would be permissible as long as it is effected "as soon as reasonably practicable," suffers from several additional flaws. That standard negates the advantage of the *Summers* bright-line rule and creates administrability problems, because it invites judicial second-guessing about whether departing occupants could have been pulled over more quickly. And there is no correlation between any of the potential justifications for a detention incident to the execution of a search warrant and the speed with which it occurs. Any extension of the *Summers* rule would also create an incongruity with other Fourth Amendment categorical rules, which contain limitations closely analogous to the "immediate vicinity" limitation embodied in *Summers* itself. And any such extension would be difficult to reconcile with the original understanding of the Fourth Amendment, because it would threaten to create a freestanding right to seize persons that flows from, yet operates independently of, the warrant-created right to search for and seize contraband at a particular location.

A detention incident to the execution of a search warrant is not an end in itself; it is a means of enabling the safe and effective completion of the search. The detention of a former occupant who has left the immediate vicinity of the premises to be searched does little or nothing to facilitate the execution of the warrant. This Court should clarify the rightful bounds of the *Summers* rule and reverse the court of appeals' erroneous judgment.

ARGUMENT

PETITIONER'S DETENTION INCIDENT TO THE EXECUTION OF A SEARCH WARRANT WAS INVALID UNDER THE FOURTH AMENDMENT

In relevant part, the Fourth Amendment of the Constitution guarantees that "[t]he right of the people to be secure in their persons * * * against unreasonable * * * seizures[] shall not be violated," and further provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The court of appeals in this case erred by holding that petitioner was validly seized and detained incident to the execution of a search warrant.

A. In *Michigan* v. *Summers*, The Court Held That Officers Executing A Search Warrant For Contraband May Detain The Occupants Of The Premises Without Individualized Suspicion

1. As this Court has recognized, the "general rule" under the Fourth Amendment is that the seizure of a person is valid only if it is based on probable cause. *Dunaway* v. *New York*, 442 U.S. 200, 213 (1979). The requirement of probable cause "has roots that are deep in our history," *Henry* v. *United States*, 361 U.S. 98, 100 (1959), and "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment," *Dunaway*, 442 U.S. at 213. A neutral magistrate must pass on the existence of probable cause either in advance of the seizure (by issuing an arrest warrant) or promptly thereafter. See, *e.g.*, *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-57 (1991).

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court recognized that an officer may also conduct a seizure of a person based on reasonable suspicion—a "less demanding standard" than probable cause. *Alabama* v. *White*, 496 U.S. 325, 330 (1990). When an officer has only reasonable suspicion, however, the Fourth Amendment imposes corresponding limits on the scope and duration of the ensuing detention: the officer must "diligently pursue[] a means of investigation that [is] likely to confirm or dispel [the officer's] suspicions quickly," *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985), and the detention may not be "prolonged beyond the time reasonably required to complete that mission," *Illinois* v. *Caballes*, 543 U.S. 405, 407 (2005).

2. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), this Court held that officers executing a search warrant for contraband have the authority to detain the occupants of the premises while the search is being conducted. *Id.* at 705. The Court emphasized that, in conducting such a detention, officers were "not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.* at 705 n.19. The Court has since made clear that the rule of *Summers* is a "categorical" one: it applies whenever the detained individual is "an occupant of [the premises] at the time of the search," regardless of whether the officer has any particular reason to believe that the individual is involved in the criminal activity that is the subject of the warrant. *Muehler* v. *Mena*, 544 U.S. 93, 98 (2005).

Like other categorical rules this Court has recognized, the rule of *Summers* thus stands as an exception to the default mode of Fourth Amendment analysis, which requires case-by-case review of the justifications for, and intrusiveness of, a particular search or seizure.

Among those categorical rules, however, the *Summers* rule is the only one that supports the detention of an individual, solely for ordinary law-enforcement purposes, without any degree of individualized suspicion. Cf. *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 40-47 (2000) (explaining that ordinary law-enforcement purposes are insufficient to justify vehicle checkpoints).[3]

One other preliminary point bears noting. Although the Court emphasized in *Summers* that a detention incident to the execution of a search warrant is only incrementally more intrusive than the search itself, see 452 U.S. at 701-702, such a detention nevertheless imposes significant restrictions on an individual's liberty. In some respects, those restrictions can actually be more burdensome than those permitted in a *Terry* stop, and more closely resemble those permitted in a full-fledged arrest. Officers need not take any additional action to confirm or dispel an individual's involvement in the criminal activity being investigated, but instead may detain the individual until the search is completed—which can take several hours. See *Muehler*, 544 U.S. at 100. During that time, officers may detain the individual in appropriate restraints, such as handcuffs. See *ibid.* And while the search is being conducted, officers may question the individual not only about the criminal activity being investigated, but also about unrelated topics (subject only to any constraints imposed by the Fifth Amendment). See *id.* at 101.[4]

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[3] Although this Court recently stated that officers may "ordinarily" detain the passenger of a car for the duration of a traffic stop, it stopped short of announcing a categorical rule. See *Arizona* v. *Johnson*, 555 U.S. 323, 333 (2009).

[4] Lower courts have taken divergent approaches in determining whether a detention pursuant to *Summers* is custodial for purposes

3. In adopting the categorical rule of *Summers*, the Court articulated three specific rationales. Because this case concerns the scope of the *Summers* rule, those rationales merit detailed examination.

a. Most importantly, the *Summers* Court cited an interest in "minimizing the risk of harm to the officers" executing the warrant. 452 U.S. at 702. As the Court correctly recognized, "the execution of a warrant to search for [contraband] is the kind of transaction that may give rise to sudden violence." *Ibid.* Occupants may react unfavorably to the initial entry of officers executing a warrant. And if the occupants are permitted to roam the premises while the search is being conducted—and, in the process, to access any weapons that may be found there—the possibility of violence will remain.

While acknowledging that the risk of violence will vary from case to case, the Court concluded in *Summers* that, as a categorical matter, the risk presented by the execution of search warrants for contraband justified the adoption of a categorical rule for detaining occupants of the premises. See 452 U.S. at 702. In that regard, the Court's reasoning tracks its reasoning in other cases that rely on officer safety as the primary justification for adopting similar categorical rules—most notably, the

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of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Compare, *e.g.*, *United States* v. *Burns*, 37 F.3d 276, 281 (7th Cir. 1994) (stating that, "in the usual case, a person detained during the execution of a search warrant is not 'in custody'"), cert. denied, 515 U.S. 1149 (1995), with *United States* v. *Davis*, 530 F.3d 1069, 1081 (9th Cir. 2008) (requiring *Miranda* warnings for questioning that goes "beyond a brief *Terry*-type inquiry") (citation omitted). Petitioner contended before the district court that he should have received *Miranda* warnings, but the district court rejected that contention. See Pet. App. 42a-52a.

rules authorizing various forms of searches incident to arrest. See, *e.g.*, *New York* v. *Belton*, 453 U.S. 454, 460 (1981) (search of car); *United States* v. *Robinson*, 414 U.S. 218, 225 (1973) (search of person); *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (search of house).

b. In addition, the *Summers* Court cited an interest in "facilitat[ing]" "the orderly completion of the search." 452 U.S. at 703. If occupants are permitted to wander around the premises, their very presence has the potential to interfere with the efficient execution of the warrant—whether because they "conceal or destroy evidence," *id.* at 702; seek to throw officers off the scent; or simply get in the way. Conversely, if the occupants are detained, officers can more safely solicit their assistance in completing the search—for example, by "open[ing] locked doors or locked containers to avoid the use of force" that would otherwise be necessary. *Id.* at 703.

c. Since *Summers*, this Court has seemingly recognized safety and efficacy as the primary justifications for the *Summers* rule. See *Los Angeles County* v. *Rettele*, 550 U.S. 609, 614 (2007) (per curiam) (noting that, under *Summers*, "officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search"); see also *Muehler*, 544 U.S. at 102 (Kennedy, J., concurring) (emphasizing that "[t]he safety of the officers and the efficacy of the search are matters of first concern").

In *Summers* itself, the Court also cited a third justification: "preventing flight in the event that incriminating evidence is found." 452 U.S. at 702. In so doing, however, the Court did not suggest that, standing alone, the interest in preventing flight would serve as a sufficient basis for a detention. Were it otherwise, officers could use that interest as a bootstrap, advancing the point at which a detention is permissible from when of-

ficers actually have probable cause to when they begin a search that they *hope* will produce probable cause. Cf. *id.* at 709 (Stewart, J., dissenting) (reasoning that, "[i]f the police, acting without probable cause, can seize a person to make him available for arrest in case probable cause is later developed to arrest him, the requirement of probable cause for arrest has been turned upside down").

Instead, the interest in preventing flight is better understood as overlapping with, and thereby reinforcing, the other interests supporting the *Summers* rule. If occupants are permitted to remain free while the search is being conducted, it will impede the efficient completion of the search, because officers will have to conduct the search while keeping an eye on the occupants. And if the occupants attempt to flee once incriminating evidence is found, it will obviously threaten the safety of the officers (and the safety of the occupants themselves). So understood, the interest in preventing flight validly supports the *Summers* rule.

B. The Court Of Appeals Extended The *Summers* Rule

As the court of appeals correctly recognized, see Pet. App. 10a, this case involves a potential extension of *Summers*, both beyond the facts of that case and beyond the rule of that case as it was framed and has since been understood.

1. In *Summers*, the Court repeatedly emphasized that it was establishing a rule that governed the detention of the "occupants of the premises" while officers are executing a search warrant for contraband. See, *e.g.*, 452 U.S. at 705. In justifying that rule, moreover, the Court explained that "it is constitutionally reasonable to require [a] citizen to *remain* while officers of the law execute a valid warrant to search his home." *Ibid.* (empha-

sis added). In ordinary usage, the phrase "occupants of the premises" more naturally refers to persons who are presently occupying the premises than to persons who have formerly occupied them and since departed. As one commentator has noted, "one would consider the audience members in a concert hall to be 'occupants of the premises,' but one would not consider those same members to be 'occupants of the premises' after they walk out of the building or as they are on their way home." Amir Hatem Ali, Note, *Following the Bright Line of 'Michigan v. Summers,'* 45 Harv. C.R.-C.L. L. Rev. 483, 500 (2010).

In subsequent cases, the Court has reinforced the foregoing understanding of the scope of the *Summers* rule. In the nearly two dozen decisions that have cited *Summers*, the Court has never suggested that a search warrant for a particular location justifies a detention that occurs away from that location. To the contrary, when invoking *Summers*, the Court has noted time and again that the rule governs detentions that occur at the premises to be searched. See, *e.g.*, *Muehler*, 544 U.S. at 98 (noting that *Summers* applies when "a warrant existed to search [the premises]" and the detained individual "was an occupant of [the premises] *at the time of the search*") (emphasis added); *Wilson* v. *Layne*, 526 U.S. 603, 611 (1999) (citing *Summers* for the proposition that "[not] every police action *while inside a home* must be explicitly authorized by the text of the warrant") (emphasis added); see also *Kolender* v. *Lawson*, 461 U.S. 352, 364 n.2 (1983) (Brennan, J., concurring) (describing the *Summers* rule as providing that "[a] suspect may be detained *in his own home* without probable cause for [the] time necessary to search the premises pursuant to a valid warrant supported by probable cause") (emphasis added).

To be sure, in *Summers* itself, officers initially seized the individual in question not inside the house, but rather in the immediate vicinity: officers encountered the individual coming down the front steps of the house, apparently as they were already in the course of executing the warrant, and brought him inside as soon as they gained entry. See 452 U.S. at 693 & n.1. In the analysis leading to its adoption of the categorical rule, however, the Court addressed the circumstances of the initial seizure only in a footnote, stating that "[w]e do not view the fact that respondent was leaving his house when the officers arrived to be of constitutional significance." *Id.* at 702 n.16. Although the Court did not meaningfully elaborate on that statement, it appears to have applied the principle of *de minimis non curat lex*, concluding that the rationales supporting a detention when it occurs entirely inside the premises operated with similar force when the initial seizure occurs on the doorstep. *Ibid.*

2. The detention in this case differs in kind from the detention in *Summers*. Most significantly, petitioner was not initially seized in the immediate vicinity of the premises as officers were in the process of executing the warrant. Instead, one set of officers followed petitioner from the apartment to be searched for approximately a mile, and then detained him at the same time as different teams of officers executed the search warrant back at the apartment. Although preparations for the search were well underway, the evidence raises the possibility that the search was specifically timed to justify the detention: shortly after the surveilling officers informed the supervising officer on the scene of their intention to follow and detain petitioner, the supervising officer led the entry and search teams to execute the warrant. See

J.A. 126-127.[5] In addition, the officers detained petitioner in full public view for several minutes—frisking him and questioning him about his connection with the apartment—before handcuffing him and transporting him in a marked police car back to the apartment. In those respects, the facts of this case vary dramatically from the facts of *Summers*. And as explained below, the court of appeals' extension of the rule of *Summers* to this case cannot be justified.

C. The Justifications For The *Summers* Rule Do Not Support The Detention Of A Former Occupant Who Has Left The Immediate Vicinity Of The Premises To Be Searched

In *Arizona* v. *Gant*, 556 U.S. 332 (2009), this Court explained that, in "defin[ing] the boundaries of" a Fourth Amendment categorical rule, it should "ensure[] that the scope of [the rule] is commensurate with its purposes." *Id.* at 339. Thus, the Court rejected lower courts' broad reading of its earlier decision in *Belton*, under which "a vehicle search would be authorized incident to every arrest of a recent occupant." *Id.* at 343. Reasoning that such an interpretation of the search-incident-to-arrest rule would "untether the rule from the justifications underlying [it]"—namely, officer safety and the preservation of evidence—the Court held that such a search is permissible only when the arrestee is within reaching

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[5] In fact, in grand jury testimony that was produced to the defense pursuant to the Jencks Act and used at trial (but apparently not admitted into evidence), Officer Sneider suggested that it is the practice of Suffolk County police officers, while they are preparing to execute a search warrant, to "surveil the house just in case someone leaves so that we can hold onto them until we actually do execute the warrant." App., *infra*, 2a.

distance of the car or the officer has reason to believe that the car contains relevant evidence. *Ibid.*

This Court should conduct a similar analysis here—and reach a similar result. In determining whether to extend the categorical rule of *Summers* to detentions that occur away from the immediate vicinity of the premises to be searched, the Court should analyze the applicability of the rationales that originally justified the rule. And the government bears the burden of showing that those rationales are applicable in the mine run of cases to which the rule would be extended.

When the requisite analysis is conducted, this is not a close case. Each of the three rationales articulated in *Summers* applies with little or no force when a former occupant is detained after leaving the scene. As in *Gant*, permitting such detentions would "untether" the categorical rule from its underlying justifications. And it would potentially authorize the detention of anyone who is a resident of, or otherwise associated with, the premises to be searched, regardless of where that individual is found. This Court should reaffirm the limited scope of the *Summers* rule and reject the court of appeals' proposed extension.

1. a. When an individual has left the immediate vicinity of the premises to be searched, the individual poses minimal risk, if any, to the officers executing the warrant. To state the obvious, an individual who has departed the scene poses no threat of "sudden violence" to the officers. *Summers*, 452 U.S. at 702. And because the police have no incentive to advertise their presence before executing a search warrant, such an individual will ordinarily have no reason to know that a search is imminent—and thus no reason to alert others who may still

be inside and have the potential to compromise officer safety.[6]

b. In its brief at the certiorari stage, the government posited a hypothetical scenario in which an individual who has departed could still pose a threat to officer safety. According to the government, after an individual has left the scene, "anyone on the premises or nearby could readily alert a departing occupant to the search by placing a call to his cell phone or sending him a text message," and the individual could then "suddenly return—possibly armed and with the assistance of others—to obstruct the search." Br. in Opp. 11-12.

As a preliminary matter, it is worth reflecting on the implausibility of the government's scenario. When officers execute search warrants today—particularly warrants for contraband and other warrants deemed to be "high-risk"—they typically do so with overwhelming force, precisely out of concern for officer safety. See, *e.g.*, *Muehler*, 544 U.S. at 96 (describing use of SWAT team to execute warrant for weapons).[7] In this case, the

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[6] In this case, there is no indication that either petitioner or Bryant Middleton, the other detained individual, was aware of the officers' presence at the time they left the scene. If officers have reason to believe that an individual has learned of their presence—for example, if they see him suddenly fleeing the scene at a high rate of speed—they may have a justification for detaining him. Cf. *Illinois* v. *Wardlow*, 528 U.S. 119, 124-125 (2000) (holding that, in some circumstances, flight from police justifies a *Terry* stop).

[7] For example, the Boston Police Department requires that SWAT teams be used whenever the presence of firearms is "reasonably suspected," and ordinarily requires that search warrants be executed by a team consisting of at least one supervisor and six officers. See Boston Police Department, *Rules and Procedures*, Rule 334, § 3 (June 14, 2006) <tinyurl.com/bostonrule334>.

supervising officer on the scene testified that, in Suffolk County, all search warrants are executed by an Emergency Services Unit, the functional equivalent of a SWAT team. See J.A. 124-125.[8] Where, as here, a large team of well-armed officers executes the warrant—and where the officers take basic precautions, such as erecting barricades or posting someone on the perimeter or at the door while the search is ongoing—it is highly unlikely that an individual will "return with an army" to disrupt the search. Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 270 (1984); cf. *Leveto* v. *Lapina*, 258 F.3d 156, 171 (3d Cir. 2001) (Alito, J.) (noting the reduced risk of disruption where a "large group of agents" had executed the warrants at issue).[9]

Unsurprisingly, the government fails to cite a single case in which its scenario has actually come to pass. And even if it could, it would still be unable to justify an extension of the *Summers* categorical rule, because the

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[8] Even relatively small police departments have SWAT teams or comparable units that are available to assist in the execution of search warrants. See Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 Soc. Probs. 1, 6 (1997) (reporting that, as of 1995, 89% of cities with populations over 50,000 had their own paramilitary police unit); Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 Just. Q. 607, 611-612 (1997) (same for 65% of cities with populations between 25,000 and 50,000).

[9] Where an individual returns to (or arrives at) the premises while the search is ongoing, lower courts have consistently held that the individual can be detained under the rule of *Summers*. See, *e.g.*, *United States* v. *Jennings*, 544 F.3d 815, 818-819 (7th Cir. 2008); *United States* v. *Bohannon*, 225 F.3d 615, 617 (6th Cir. 2000); *Baker* v. *Monroe Township*, 50 F.3d 1186, 1191-1192 (3d Cir. 1995).

government must show that the officer-safety rationale is implicated in the mine run of cases to which the rule would be extended. Cf. *Thornton* v. *United States*, 541 U.S. 615, 625-626 (2004) (Scalia, J., concurring in the judgment) (rejecting officer safety as a justification for a broad reading of *Belton* where a handcuffed arrestee would have to be "possessed of the skill of Houdini and the strength of Hercules" to threaten officers) (citation omitted).

In addition, the government's scenario proves too much: it would seemingly justify detaining not only a current or recent "occupant" of the premises, but any individual who officers have reason to believe is a resident of, or otherwise associated with, the premises—regardless of where that individual is found. The resident of a house that is being searched could just as easily receive a call or a text message from a neighbor when he is at work as he could when he is leaving the house on the way to work; in either instance, he could theoretically return to the house to disrupt the search. It would make no sense to permit a detention based on that threat only in the latter instance, but not in the former. Yet a rule that would detach the ability to detain an individual incident to the execution of a search warrant from the individual's status as a current or recent "occupant" could not easily be reconciled with *Summers* itself.[10]

Finally on this point, a rule that permitted officers to conduct detentions away from the scene would create

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[10] Lower courts have consistently held that the *Summers* rule cannot be used to justify detentions of individuals who are not at or leaving the premises to be searched. See, *e.g.*, *United States* v. *Reinholz*, 245 F.3d 765, 777-778 (8th Cir.), cert. denied, 534 U.S. 896 (2001).

risks of its own. When an individual leaves the scene by car, officers would have to conduct the equivalent of a traffic stop in order to seize that individual—an encounter that would present risks comparable to, if not greater than, the risks presented by the execution of a search warrant.[11] And the very act of following an individual away from the premises would itself eventually alert the individual to the police's presence—which, in turn, could cause him to warn others still on the premises of the police's impending arrival. Given those countervailing risks, it is impossible to say with any confidence that a rule permitting officers to conduct detentions away from the scene actually minimizes the risk to officers executing the warrant—much less that it does so sufficiently to support an extension of the *Summers* categorical rule.

c. At the suppression hearing, the surveilling officers testified that they detained petitioner approximately a mile away because they believed it was safer to detain him there than it would have been to detain him right outside the apartment. See J.A. 48-51, 68-72, 85-86, 103-105; Pet. App. 4a n.3, 24a. Specifically, the officers raised the possibility that conducting the detention right outside would have alerted others who may still have been inside as to the imminent search, thus potentially compromising the safety of the searching officers. See J.A. 48-49, 85. In adopting its extension of the *Summers* rule, the court of appeals expressed a similar concern. See Pet. App. 14a-15a.

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[11] See Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted* tbl. 19 (2010) <tinyurl.com/fbi2010table> (reporting that, from 2001 to 2010, 95 police officers were killed in traffic stops, compared with 43 killed in investigative or tactical activities).

"The weakness of this argument is that it assumes that, one way or another, the [detention] must take place." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring in the judgment). For purposes of the *Summers* categorical rule, the appropriate focus is not on the safest way to detain a recent occupant of a house—as if officers have a freestanding entitlement to conduct a detention and the only question is where and how the detention takes place. Instead, the appropriate focus is on the safest way to *execute the search warrant*: specifically, whether it materially promotes the safety of the officers executing the warrant to permit the detention of a former occupant who has left the scene. As explained above, it does not.

To be sure, a rule that permits detentions only within the immediate vicinity of the premises to be searched requires an officer to exercise his authority or risk losing it. But that is simply because the justifications for a detention incident to the execution of the search warrant evaporate once the occupant leaves the scene.[12] Common sense and experience do not teach that an occupant who has left the scene ordinarily poses a threat to the officers executing the warrant. For that reason, the officer-safety rationale does not support an extension of the *Summers* rule.

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[12] It bears emphasizing that *Summers* merely *permits* detentions within the immediate vicinity of the premises to be searched; it does not *require* them. If officers see an occupant on the doorstep but are concerned that a detention there would present safety issues, they have other options besides proceeding to detain the occupant and execute the warrant. For example, they can wait to execute the warrant until the occupant leaves (keeping tabs on the occupant if desired) or until the occupant returns (detaining the occupant on the premises).

2. As the lower courts in this case implicitly acknowledged, the detention of an individual who has left the immediate vicinity of the premises to be searched also does not materially advance the interest in facilitating the orderly completion of the search. See Pet. App. 14a n.6, 30a (citing only the other *Summers* rationales). Again, the reason is obvious: an individual who is not present at the scene cannot interfere with the efficient execution of the search by destroying or concealing evidence or distracting officers from the task at hand.

Nor is there any reason to believe that detaining an individual who has left the scene and returning him to the premises will facilitate the search. To the contrary, because it occurs away from the premises to be searched, the seizure of such an individual will necessarily divert officers who might otherwise be involved in conducting the search. And once the officers return the individual to the scene, the individual's presence may complicate the search by increasing the number of people at the site and creating a distraction that would not otherwise have existed.

In its brief at the certiorari stage, the government suggested that a returning individual may be willing to assist the searching officers by "opening any locked doors or containers." Br. in Opp. 9 (citing *Summers*, 452 U.S. at 703). But the officers will not need such assistance in every case; they cannot compel an unwilling individual to provide that assistance;[13] and any assistance is likely to advance the completion of the search only modestly. The better view, therefore, is that the reference in *Summers* to opening locks was "not * * * crit-

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[13] In this case, petitioner made clear to the officers that he was "not cooperating with [their] investigation." J.A. 57, 90.

ical" to the Court's analysis. *United States* v. *Sanchez*, 555 F.3d 910, 917 (10th Cir.), cert. denied, 556 U.S. 1145 (2009).

3. a. The only remaining rationale from *Summers* is the interest in preventing flight in the event that incriminating evidence is found. As a preliminary matter, should the Court conclude that the interests in ensuring safety and efficacy do not support an extension of the *Summers* rule, the interest in preventing flight cannot sustain such an extension on its own. As discussed above, a contrary understanding would permit detentions based not on probable cause, but rather on the mere hope that probable cause will later develop. See pp. 17-18, *supra*.

Any debate about the propriety of relying on the interest in preventing flight is ultimately academic, however, because that interest is served here only slightly, if at all. When an individual is detained on the premises (or in the immediate vicinity when officers are in the course of executing the warrant), the individual will naturally be aware of the ongoing search—and will therefore have the incentive to flee if he is aware that the premises contain incriminating evidence. By contrast, an individual who has left the scene will ordinarily have no reason to know that a search is imminent—and will therefore have no reason to flee. See pp. 22-23, *supra*.

b. In its brief at the certiorari stage, the government asserted that the same scenario that could present a risk of harm to officers could also present a risk of flight: another party could alert an individual who has left the scene, thus prompting the individual to flee. See Br. in Opp. 11.

The government's scenario carries little more weight in the context of flight risk than it does in the context of officer safety. For starters, it again proves too much.

The resident of a house that is being searched could just as easily receive a call or a text message from a neighbor when he is at work, at the supermarket, or in the next town over. And in those circumstances, the resident would have no less an incentive to flee than if he happens to be driving away from the house when the call or text message comes. Again, the government's scenario would seemingly justify the detention of any individual who officers have reason to believe is a resident of, or otherwise associated with, the premises to be searched, regardless of where that individual is found—a dramatic expansion of the categorical rule of *Summers* that this Court cannot possibly have envisioned.

Furthermore, officers have less intrusive means at their disposal for ensuring that an individual leaving the scene does not flee—and for finding the individual in the event that he does. Officers can follow an individual who has left the scene and then detain him in the event that incriminating evidence is uncovered during the search. And if officers prefer not to divert resources from the search for that purpose, they can readily gather identifying information that will help them to track down the individual. When an individual leaves the scene by car, officers can record the car's license plate and model information, run a computer check, and use the resulting information to locate him if the search turns up incriminating evidence.[14] In short, the full panoply of traditional law-enforcement tactics remain available to the police, up until the point they develop the requisite level of individualized suspicion necessary to justify a detention under ordinary Fourth Amendment principles.

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[14] In this case, the officers did not run a check of the car's license plate until sometime after the detention. See J.A. 226-227.

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Given the inapplicability of the rationales articulated in *Summers* to a situation in which a former occupant is detained after leaving the scene, one is left with the sense that detentions of this type are driven primarily by considerations of officer convenience: specifically, the desire to have persons associated with the premises close at hand in the event that incriminating evidence is found. That desire is understandable, but it does not render ensuing detentions constitutional. This Court has repeatedly explained that officer convenience cannot justify dispensing with the ordinary requirements of the Fourth Amendment. See, *e.g.*, *Gant*, 556 U.S. at 349; *Trupiano* v. *United States*, 334 U.S. 699, 706 (1948); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948). *A fortiori*, officer convenience cannot justify the broadening of a categorical exception to those requirements. This Court should thus limit the categorical rule of *Summers* to the circumstances for which it was originally intended, and hold that it applies only to detentions that occur within the immediate vicinity of the premises.

D. The Detention Of A Former Occupant Who Has Left The Immediate Vicinity Of The Premises To Be Searched Is More Intrusive Than A Detention Covered By The *Summers* Rule

The detention in this case is invalid under *Summers* for an additional reason. In *Summers*, the Court weighed the rationales for the detention against "the character of the official intrusion." 452 U.S. at 701. Not only do the rationales articulated in *Summers* apply with considerably lesser force when an individual is detained away from the immediate vicinity of the premises to be searched, but the resulting detention is correspondingly more intrusive.

1. In adopting the categorical rule of *Summers*, the Court heavily relied on the proposition that the detention of an *occupant* of the premises to be searched is only incrementally more intrusive than the search itself. See 452 U.S. at 701-702. The Court explained that, "because the detention in this case was in [the individual's] own residence, it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station." *Id.* at 702. In its footnote addressing the fact that the individual had initially been seized as he was coming down the front steps of the house, the Court observed that "[t]he seizure of [the individual] on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside." *Id.* at 702 n.16.

Where, as here, the initial seizure occurs in a public place away from the immediate vicinity of the premises, the intrusiveness of the seizure and ensuing detention is far greater. An individual who is seized away from the scene is likely to be detained in full public view for at least several minutes, as petitioner was in this case. And where officers decide to return the individual to the scene, the individual is likely to be subjected to the additional indignities of being placed in handcuffs and being transported in a police car, as petitioner also was in this case. See *Leveto*, 258 F.3d at 169 (citing *Summers* for the proposition that "a seizure is more intrusive if it involves moving the suspect to another locale") (internal quotation marks and citation omitted). In short, a detention of this type is hardly an incremental intrusion: it "produce[s] all the indignity of an arrest in full view of the public," *Commonwealth* v. *Charros*, 824 N.E.2d 809, 816 (Mass.), cert. denied, 546 U.S. 870 (2005)—save for

the fact that it ends at a house, rather than the station-house.

2. In support of its conclusion that a detention incident to the execution of a search warrant was only minimally intrusive, the *Summers* Court also reasoned that "the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." 452 U.S. at 701.

Where, as here, the initial seizure occurs in a public place away from the immediate vicinity of the premises, the potential for exploitative questioning is far greater. In the typical situation covered by the rule of *Summers*, any detention will be truly incidental to the search: the officers executing the warrant will be the ones encountering the individual and conducting the detention, and they will likely be too preoccupied with effectuating the search to take unfair advantage of the individual. Indeed, a central premise of the *Summers* rule is that such detentions are necessary to *enable* officers to maintain a single-minded focus on conducting and completing the search. See 452 U.S. at 702-703. Where the detention of a former occupant and the execution of the search warrant occur at entirely separate locations, however, different officers will necessarily be required to carry out both tasks, and the focus of the officers conducting the detention will inevitably be on the detained individual, rather than on the search itself. That is exactly what occurred here, with petitioner being subjected to questioning that was seemingly designed to elicit responses connecting him with the premises being searched—responses that proved to be central to the prosecution's case at trial.

Indeed, if this Court were to embrace the court of appeals' extension of the *Summers* rule, it would exacerbate the incentives for officers to conduct detentions of this type precisely for the purpose of facilitating questioning of potential suspects—questioning that ordinarily would not be permissible in the absence of individualized suspicion. The detaining officers could engage in that questioning at leisure, secure in the knowledge that the Fourth Amendment imposes no restriction on their ability to conduct questioning for the potentially multi-hour duration of the search. See *Muehler*, 544 U.S. at 101. Such an exploitative practice would in no way serve the primary purpose of the *Summers* rule: to enable the safe and efficient completion of the search by the officers executing the warrant. The potential for exploitation underscores the intrusiveness of a detention that occurs away from the scene, and it provides another reason to reaffirm the limited scope of the *Summers* rule.

E. The Court Of Appeals' Extension Of The *Summers* Rule Is Deeply Flawed

In the decision under review, the court of appeals held that "*Summers* authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected *as soon as reasonably practicable*." Pet. App. 19a. That standard for detention incident to the execution of a search warrant suffers from several additional flaws.

1. In holding that the detention of a former occupant who has left the premises to be searched is permissible as long as the detention occurs "as soon as reasonably practicable," the court of appeals seemingly sought to glue a veneer of "reasonableness" onto its extension of the *Summers* categorical rule. The whole point of

Fourth Amendment categorical rules, however, is that they *avoid* the default mode of case-by-case reasonableness analysis, establishing bright lines and standardized procedures based on empirical judgments about the necessity of certain types of police conduct. See 2 Wayne R. LaFave, *Search and Seizure* § 4.9(e), at 726 (4th ed. 2004) (LaFave).

A standard that requires courts to assess whether detentions occurred "as soon as reasonably practicable" would open a new front of *post hoc* litigation and undermine the chief advantage of the *Summers* categorical rule, as officers are subjected to second-guessing by courts armed with Google Maps speculating about whether departing occupants could have been pulled over more quickly. Such a standard would provide little guidance to officers and "generate[] a great deal of uncertainty, particularly for a rule touted as providing a 'bright line.'" *Gant*, 556 U.S. at 346. By contrast, a rule that permits detentions only in the immediate vicinity of the premises is far clearer and easier to administer, even if it is possible to hypothesize close cases at the margin.

In addition, if officers are permitted to detain a former occupant who has left the premises, it is hard to see why it matters how quickly they effectuate the detention. There is no correlation between any of the potential justifications for the detention and the speed with which it occurs; if the mere fact that an individual is seen leaving the premises provides a basis for the detention (for example, on the theory that the individual could storm back to the scene and threaten officer safety), it matters not whether officers seize the individual a few blocks or a few miles away. Indeed, as discussed above, if it is true that the rationales articulated in *Summers* support an extension of the categorical rule in this case, it is hard to see why they would not support the detention of any in-

dividual who officers have reason to believe is a resident of, or otherwise associated with, the premises to be searched—not simply any individual whom officers happen to have seen leaving the premises. The court of appeals' "as soon as reasonably practicable" limitation is thus merely an arbitrary bound that disguises the expansiveness of the court's underlying reasoning.

2. Any extension of the *Summers* rule would also create an incongruity with other Fourth Amendment categorical rules—most notably, the rules governing searches incident to arrest. One leading commentator has noted the doctrinal "consanguinity" between the rule of *Summers* on the one hand, and the rules of cases involving searches incident to arrest on the other: whereas *Summers* involved "a seizure that was 'piggy-backed' onto a search," the latter cases involved searches piggy-backed onto seizures. Wayne R. LaFave, *Being Frank About the Fourth*, 85 Mich. L. Rev. 427, 455, 457 (1986).

In developing the rules governing searches incident to arrest, the Court has adopted limitations on the permissible reach of those searches. For example, in *Chimel*, the Court overruled its earlier decision in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), and held that officers conducting a search incident to arrest within a home were permitted to search only "the area within [the arrestee's] immediate control"—*i.e.*, "the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763 (internal quotation marks omitted).[15] In adopting that limitation, the

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[15] Similarly, in *Maryland* v. *Buie*, 494 U.S. 325 (1990), the Court held that, in conducting a protective sweep incident to arrest, officers were categorically permitted to search only those areas "immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334.

Court explained that the justifications for a search incident to arrest "are absent where a search is remote in time or place from the arrest." *Id.* at 764 (citation omitted). The same is true with regard to the justifications for a detention incident to the execution of a search warrant where the detention is remote in time or place from the search. The "immediate control" limitation of *Chimel* is therefore closely analogous to the "immediate vicinity" limitation embodied in a proper understanding of the *Summers* rule.

3. Last but not least, any expansion of the *Summers* rule would be difficult to reconcile with the original understanding of the Fourth Amendment. As this Court has noted, the adoption of the Fourth Amendment was in large part motivated by a disdain for British use of general warrants. See, *e.g.*, *Chimel*, 395 U.S. at 761; *Henry*, 361 U.S. at 100-101. In the words of James Otis, the routine issuance of general warrants placed "the liberty of every man in the hands of every petty officer." 2 *The Works of John Adams* 524 (Charles Francis Adams ed. 1850). The Fourth Amendment addressed that concern through its particularity requirement, which provides that a warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV; see, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971).

In the course of adopting its categorical exception to the default probable-cause requirement for seizures of persons, the *Summers* Court reasoned that any warrant to search a particular place for contraband "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705. The Court did not elaborate on how that rule could be squared with the Warrant Clause's particularity requirement. Nor did the Court

cite any historical evidence (whether from the time of the founding or thereafter) indicating that officers executing search warrants engaged in the practice of detaining the occupants of the premises. To the contrary, the historical evidence more generally suggests that "prearrest searches and seizures played a small role in the investigation of ordinary crimes." William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 401 (1995).

In light of the foregoing considerations, any expansion of the *Summers* rule would be of questionable validity, because it would effectively create a freestanding right to seize persons that flows from, yet operates independently of, the warrant-conferred right to search for and seize contraband. The detention would cease to constitute a means of better effectuating the search; it would become an end in itself. And once the initial seizure occurs, other Fourth Amendment doctrines would enable officers to conduct a frisk of the detained individual, engage in questioning, and provide the fruits of their efforts to prosecutors for subsequent use at trial.

If this Court were to adopt the court of appeals' approach, therefore, there would be a very real risk that officers will use search warrants as a mechanism for detaining individuals they do not have probable cause to arrest—resulting in a practice that is "indistinguishable from what might be done under a general warrant." *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (Hand, J.); cf. *Chimel*, 395 U.S. at 767 (noting that a broader view of the search-incident-to-arrest doctrine would "give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at

home rather than elsewhere").[16] It is hard to imagine that the Framers would have countenanced that result.

As was true with searches incident to arrest under *Belton*, officers have come to view the ability to conduct a detention incident to the execution of a search warrant as a "police entitlement," rather than as "an exception justified by [its underlying] rationales." *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part). Like in *Gant*, this Court should correct that mistaken understanding, and reaffirm the limited scope of the *Summers* rule.

* * * * *

As noted at the outset, categorical rules are the exception, rather than the norm, under the Fourth Amendment. And whether the question presented involves recognition of a new categorical rule or expansion of an existing one, it is incumbent on the government to make the case for why the categorical rule is necessary. Because the justifications for the original *Summers* rule do not adequately support the detention of a former occupant who has left the immediate vicinity of the premises to be searched, the court of appeals' extension of that rule should be rejected.

That is not to say that detentions of former occupants will invariably be improper. For example, officers remain free to conduct a detention when they possess the requisite level of individualized suspicion, provided the detention is appropriate in scope and duration.[17] Be-

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[16] The potential for abuse is of particular concern in light of the dramatic increase in the issuance of search warrants in recent years. See, *e.g.*, 1 LaFave § 1.2(b), at 33.

[17] In the lower courts, the government argued that petitioner's detention could be justified under *Terry*, based on the additional fact

cause detentions of former occupants do not categorically promote the safe and efficient completion of searches, however, they cannot be justified under *Summers*. The court of appeals' contrary conclusion "abandon[s] [the] constitutional moorings" of the *Summers* rule. *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (citation omitted). That conclusion, and the judgment below, should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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that petitioner (like Bryant Middleton, the other man in the car) matched the generic description of a suspect provided by the confidential informant. The court of appeals expressly declined to consider that issue. See Pet. App. 16a n.7. Should this Court agree that petitioner's detention cannot be justified under *Summers*, the government remains free to renew its *Terry* argument on remand.

APPENDIX

TRANSCRIPT OF GRAND JURY PROCEEDINGS
(Apr. 6, 2006)

*****

[4]

Whereupon,

RICHARD SNEIDER,

having been first duly sworn by the Grand Jury Foreperson, took the stand and testified as follows:

*****

[20]

(The witness re-enters the Grand Jury chamber at 12:10 p.m.)

EXAMINATION BY

MR. KELLY:

Q. You understand you continue to be under oath?

A. Yes.

Q. In terms of the timing of the search, you said you were surveilling it and you saw two people left.

Were you waiting for the two people to leave before you executed the warrant?

A. No.

Q. Tell the grand jurors what the situation was.

A. At that time the emergency services personnel were forming up and getting ready to hit the house. That takes them probably half-hour, 45 minutes to

do after we get the warrant. They won't do that until we actually have a judge sign the warrant.

And during that time period while we were setting up, we surveil the house just in case someone leaves so that we can hold onto them until we actually do execute the warrant.

In this case, probably five minutes before we executed the warrant, they left the house.

Q. So that was a coincidence of timing?

A. Yes.

Q. You weren't waiting for people to leave to execute the [21] warrant?

A. No.

Q. Thank you. If there are any more questions, I will bring you back.

(The witness was excused from the Grand Jury chamber.)

RESPONDENT'S BRIEF

No. 11-770

In the Supreme Court of the United States

CHUNON L. BAILEY, AKA POLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Fourth Amendment permitted police officers, incident to the execution of a valid search warrant for a deadly weapon at a private residence, to detain an occupant who left the immediate vicinity of the premises, when the detention was conducted as soon as reasonably practicable.

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Amir Hatem Ali, Note, *Following the Bright Line of* Michigan v. Summers*: A Cause for Concern for Advocates of Bright-Line Fourth Amendment Rules*, 45 Harv. C.R.-C.L. L. Rev. 483 (2010) 29

Laurence A. Benner & Charles T. Smarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 Cal. W. L. Rev. 221 (2000) 35

William J. Dinkin & Cullen D. Seltzer, *Criminal Law and Procedure*, 35 Univ. of Richmond L. Rev. 537 (2001) 35

Wayne R. LaFave, *Search and Seizure*:

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Vol. 4 (4th ed. 2004) 26

Dane Schiller & John MacCormack, *Two Border Agents Killed in Ambush*, San Antonio Express-News, July 8, 1998 38

Andrew P. Sutor, *Police Operations: Tactical Approaches to Crimes in Progress* (1976) 45

Paul B. Weston & Kenneth M. Wells, *Criminal Investigation: Basic Perspectives* (3d ed. 1980) 45

In the Supreme Court of the United States

No. 11-770

CHUNON L. BAILEY, AKA POLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 652 F.3d 197. The order of the district court denying petitioner's motion to suppress (Pet. App. 22a-57a) is reported at 468 F. Supp. 2d 373.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on September 20, 2011 (Pet. App. 21a). The petition for a writ of certiorari was filed on December 16, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was found guilty of possessing at least five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii); possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and possessing a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-20a.

1. On Thursday, July 28, 2005, a reliable confidential informant told Detective Richard Sneider of the Suffolk County Police Department about a recent drug deal involving a firearm. Specifically, the informant told Detective Sneider that the previous weekend he had purchased six grams of crack cocaine at the basement apartment of a house located at 103 Lake Drive, Wyandanch, New York. The informant stated that he had purchased the drugs from a "heavy set black male

with short hair" known as "Polo." The informant further stated that while inside Polo's apartment he had seen a chrome .380-caliber handgun on the kitchen counter with the drugs and that he had seen the same gun during several drug buys at Polo's previous residence in Bay Shore, New York. See Pet. App. 3a; J.A. 21-22, 26, 186-191.

Based on that information, at 8:45 p.m. that evening, Detective Sneider obtained a warrant to search the Lake Drive basement apartment for a .380-caliber handgun and any ammunition. Because of the possible presence of a deadly weapon, the "no-knock" warrant authorized officers to enter the apartment without first giving notice of their authority. While Detective Sneider was obtaining that warrant, at approximately 8:30 p.m., Detectives Daniel Fischer and Richard Gorbecki arrived at the house in an unmarked car and began surveilling the property. That way officers might know, when executing the warrant, whether and how many occupants were inside the apartment and what they were doing. After obtaining the warrant, Detective Sneider arrived on the scene and switched places with Detective Fischer. See J.A. 16-18, 83-84, 122, 191-192.

At 9:56 p.m., as other officers were preparing to execute the warrant, Detectives Sneider and Gorbecki observed two heavyset black males with short hair—both of whom thus fit the description of Polo—exit a gate at the top of the basement steps. The two men were petitioner and another individual, Bryant Middleton. The detectives decided not to detain petitioner and Middleton in the driveway, because of the possibility that it could alert others in the apartment to the presence of law enforcement (and thus vitiate the purpose of the no-knock warrant). Instead, the detectives watched as the

men got into a black Lexus and drove away from the house, with petitioner behind the wheel and Middleton in the front passenger's seat. The detectives waited a few seconds to allow some distance between the vehicles, and then they followed petitioner's car west on Lake Drive. See J.A. 45-49, 67-71, 84-86, 102-104, 193-195.

As a map of the area illustrates (see J.A. 117), that part of Lake Drive proceeds almost straight west for several short blocks to the intersection of Mount Avenue and Straight Path. Detectives Sneider and Gorbecki caught up with petitioner's car at that intersection, as petitioner was turning to the northeast onto Straight Path. That portion of Straight Path, however, is a busy five-lane highway, so Detectives Sneider and Gorbecki stopped petitioner's car approximately two blocks later when petitioner turned from Straight Path onto South 18th Street. At that point, the detectives pulled over petitioner's car in the well-lit parking lot of the Wyandanch fire station. From start to finish, the detectives followed petitioner's car for no more than five minutes and for a total distance of approximately seven-tenths of a mile. See Pet. App. 3a-4a & n.3; J.A. 48-51, 69-73, 85-87, 102-106, 194.

The detectives then asked petitioner and Middleton to exit the car and conducted pat-down searches of both men. Officer Sneider found a set of keys, including the key to the Lexus, in petitioner's front pocket. At Officer Sneider's request, petitioner identified himself and said that he was coming from his house at 103 Lake Drive. Petitioner also produced a driver's license with an address in Bay Shore, New York, which was consistent with the informant's report that Polo previously lived and sold drugs in Bay Shore. Middleton identified himself as well and said that petitioner was driving him

home so that he could comply with a 10 p.m. curfew imposed as a condition of his parole. Middleton also stated that petitioner's residence was 103 Lake Drive. At that point, the detectives placed petitioner and Middleton in handcuffs. When petitioner asked why he was being handcuffed, the detectives informed both men that they were being detained (but not arrested) incident to the execution of a search warrant at the basement apartment of 103 Lake Drive. In response, petitioner said: "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your investigation." Pet. App. 4a-5a; J.A. 52-56, 87-90, 107-111, 195-201.

Detectives Sneider and Gorbecki called a patrol car to return petitioner and Middleton to 103 Lake Drive; Detective Sneider drove the unmarked police car back to that location; and Detective Gorbecki drove petitioner's car. By the time they arrived back at the scene, officers had entered and secured the apartment and observed a gun and drugs in plain view. Petitioner and Middleton were arrested, and petitioner's keys were seized incident to his arrest. In total, no more than 10 to 12 minutes elapsed between when petitioner's car was stopped and when he was arrested. During their subsequent search of the apartment, officers found two additional guns (a loaded semiautomatic pistol and a rifle), many rounds of ammunition, a bulletproof vest, 40 grams of crack cocaine, 39 grams of powder cocaine, drug paraphernalia, and several documents with petitioner's name on them. Several boxes of personal items indicated someone had recently moved into the apartment. An officer also discovered that one of petitioner's keys opened the door of the apartment. See Pet. App. 4a-5a; J.A. 28-29, 59-60, 91-93, 115, 127-138, 151-168, 180-181, 201-205; C.A. App. A355.

2. In April 2006, a grand jury indicted petitioner on one count of possessing at least five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii); one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and one count of possessing a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i). C.A. App. A28-A29. Petitioner moved to suppress his house key and statements to Detectives Sneider and Gorbecki on the ground, *inter alia*, that they constituted the fruits of an unlawful detention under the Fourth Amendment. *Id.* at A52-A62.

The district court denied petitioner's motion to suppress. Pet. App. 22a-57a. As relevant here, the court first rejected petitioner's argument that his detention was unlawful under *Michigan* v. *Summers*, 452 U.S. 692 (1981), because he was detained shortly after leaving the premises to be searched. Pet. App. 27a-35a. According to the court, "[t]here is no basis for drawing a 'bright line' test under *Summers* at the residence's curb and finding that the authority to detain under *Summers* always dissipates once the occupant of the residence drives away." *Id.* at 30a. The court noted that in *Summers* itself, this Court "[did] not view the fact that [the defendant] was leaving his house when the officers arrived to be of constitutional significance." *Id.* at 29a (second set of brackets in original) (quoting *Summers*, 452 U.S. at 702 n.16). In addition, the court explained that "[a]t least two of the law enforcement interests articulated in *Summers* appl[y] here—namely, prevention of flight should incriminating evidence be found during the search and minimizing the risk of harm to the officers." *Id.* at 30a.

With respect to the interest in officer safety, the district court further explained that petitioner's bright-line rule would require police officers "to effectuate the detention in open view outside the residence that was about to be searched, thereby subjecting them to additional dangers during the execution of the search, and potentially frustrating the whole purpose of the search due to destruction of evidence in the residence." Pet. App. 30a. "Specifically," the court observed,

> such an action could jeopardize the search or endanger the lives of the officers * * * by allowing any other occupants inside the residence, who might see or hear the detention of the individual outside the residence as he was leaving, to have some time to (1) destroy or hide incriminating evidence just before the police are about to enter for the search; (2) flee through a back door or window; or (3) arm themselves in preparation for a violent confrontation with the police when they entered to conduct the search.

Id. at 30a-31a. The court therefore upheld petitioner's detention, which it found had taken place "at the earliest practicable location that was consistent with the safety and security of the officers and the public." *Id.* at 31a.

In the alternative, the district court upheld petitioner's detention under *Terry* v. *Ohio*, 392 U.S. 1 (1968). Pet. App. 36a-42a. The court found that the detectives had reasonable suspicion to conduct an investigative stop because "[petitioner] exited the search location and matched the general description provided by the confidential informant." *Id.* at 36a. "[T]hat initial information," the court reasoned, "was bolstered by [petitioner's] statement during the stop that 103 Lake Drive was his residence, [Middleton's] statement con-

firming that, and the information on his driver's license." *Ibid.* Those facts together, the court concluded, provided "more than a sufficient factual basis under *Terry* to transport [petitioner] a short distance back to his residence and briefly detain him during the search." *Ibid.*; see *id.* at 38a-41a & n.7.

3. Petitioner proceeded to trial on the theory that he had not possessed the guns and drugs found in the Lake Drive apartment. The government presented extensive evidence linking petitioner to the apartment that was unrelated to the fruits of the detention (*i.e.*, petitioner's statements and apartment key). For instance, Middleton testified that he also knew petitioner by the name Polo; he had been to petitioner's previous residence in Bay Shore; and he was under the impression at the time they were arrested that petitioner recently had moved into the Lake Drive apartment. See J.A. 231-234; C.A. App. A231, A238; Trial Tr. 658-659. The informant testified and identified petitioner as Polo. See C.A. App. A176. The informant also testified that he observed petitioner moving into the Lake Drive apartment; the furniture in the apartment was the same as in petitioner's previous Bay Shore residence; and he saw a chrome handgun in the apartment like the one that the police recovered during the search. See *id.* at A178-179, A181. Detective Sneider testified that he saw petitioner exiting the Lake Drive apartment on the evening in question. See J.A. 192-193. And Detective Fischer testified that there were several boxes of personal items in the apartment indicating that someone had recently moved there. See J.A. 171-173, 181; C.A. App. A165. In those boxes, officers found documents with petitioner's name on them, including pay stubs and a Resorts International

club card. See J.A. 167-168, 171-180. They did not find documents containing anyone else's name. See J.A. 180.

After deliberating for a total of approximately seven hours over three days, the jury found petitioner guilty on all three counts. See C.A. App. A267-A280, A283-A310; 11/6/06 Trial Tr. 845-852. In August 2007, the district court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Pet. App. 1a.

4. The court of appeals unanimously affirmed. Pet. App. 1a-20a.[1] The court agreed with the district court that petitioner's detention during the search of his residence was reasonable under *Summers*. Specifically, the court of appeals agreed that "[t]here is no basis for drawing a 'bright line' test under *Summers* at the residence's curb and finding that the authority to detain under *Summers* always dissipates once the occupant of the residence drives away." *Id.* at 13a (brackets in original) (quoting *id.* at 30a). The court explained that "[t]he guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the preservation of evidence." *Ibid.* In that regard, the court recognized that "the very interests at stake in *Summers*"—*i.e.*, "prevention of

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[1] In December 2008, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255 (Supp. II 2008), raising a claim of ineffective assistance of trial counsel. The district court denied that motion, and petitioner appealed. The court of appeals consolidated that appeal with petitioner's direct appeal and, in the decision below, affirmed the denial of petitioner's Section 2255 motion. See Pet. App. 17a-19a. Before this Court, petitioner no longer presses his ineffective assistance claim. See Pet. Br. 7 n.1.

flight" and "minimizing the risk of harm to the officers"—justify "detention of an occupant nearby, but outside of[,] the premises" to be searched. *Id.* at 14a & n.6 (quoting *id.* at 30a).

The court of appeals observed that petitioner's contrary approach "would put police officers executing a warrant in an impossible position: when they observe a person of interest leaving a residence for which they have a search warrant, they would be required either to detain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered)." Pet. App. 14a. "*Summers* does not necessitate that Hobson's choice," the court reasoned, "particularly when '[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime.'" *Ibid.* (brackets in original) (quoting *Summers*, 452 U.S. at 703). "Indeed, to accept that argument," the court noted, "would be to strip law enforcement of the capacity to 'exercise unquestioned command of the situation,' at precisely the moment when *Summers* recognizes they most need it." *Ibid.* (quoting *Summers*, 452 U.S. at 703).

The court of appeals emphasized, however, that under its approach not every detention incident to the execution of a search warrant would be reasonable for Fourth Amendment purposes. The court explained that "*Summers* imposes upon police a duty based on both geographic *and* temporal proximity; police must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search." Pet. App. 15a. Applying that standard to this case, the court had "no trouble concluding that [petitioner's] detention was lawful under

the Fourth Amendment." *Ibid.* The court noted that petitioner "was detained for less than ten minutes before he was taken back to 103 Lake Drive" and "officers did not attempt to exploit the detention by trying to obtain additional evidence from [petitioner] during execution of the search warrant." *Id.* at 16a. Having upheld petitioner's detention as reasonable under *Summers*, the court did not decide whether the detention was also reasonable under *Terry*. *Id.* at 16a n.7.

SUMMARY OF ARGUMENT

In a pair of thoughtful opinions, the courts below explained why, under *Michigan* v. *Summers*, 452 U.S. 692 (1981), police officers executing a search warrant for contraband at a private residence may detain an occupant who has recently departed the immediate vicinity of the premises, provided that the detention is conducted as soon as reasonably practicable.

A. The reasonableness of a warrantless seizure is determined by balancing its promotion of law enforcement interests against its intrusion on personal liberty. Weighing those concerns in *Summers*, this Court held as a categorical rule that police officers executing a valid search warrant for contraband may detain occupants who leave the premises. Both *Summers* itself and later cases confirm that the manner in which officers conduct such a detention, including whether they detain the departing occupant in the immediate vicinity of the premises or a short distance away, is subject to the Fourth Amendment's requirement of reasonableness. Accordingly, no federal court of appeals has imposed an inflexible geographic limit on the *Summers* rule.

B. A strict geographic limit on detention would be inconsistent with *Summers*' reasoning and its facts. The

Court explained that when an occupant leaves a home subject to a warrant, "articulable and individualized suspicion" justifies detention. 452 U.S. at 703. Thus, although the defendant in *Summers* was detained "on the sidewalk outside" the house, the Court viewed that fact as without "constitutional significance." *Id.* at 702 n.16. As with similar types of seizures that are based on special law enforcement interests and that may be made on less than probable cause, the manner in which officers detain a departing occupant must be reasonable under the circumstances. That is why the *Summers* Court rejected the occupant's location as constitutionally significant in the face of the same arguments that petitioner advances here.

C. The Court in *Summers* pointed to three legitimate law enforcement interests that are served by detention: "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and "the orderly completion of the search," which "may be facilitated if the occupants of the premises are present." 452 U.S. at 702-703. Each of those interests applies with similar force when an occupant is detained a short distance away from the premises. In addition, two other substantial law enforcement interests can be served by detention away from the premises: officers' interest in avoiding detection by those inside the premises before they execute the warrant, and their interest in executing the warrant only once they are fully prepared to do so.

D. Detaining an occupant outside the immediate vicinity of the premises does not represent a greater intrusion on his personal liberty than detaining him inside the premises. Wherever he is initially detained—inside the residence, at the threshold, or a short distance away

—the restraint on his liberty is the same. The Court in *Summers* rejected the notion that a seizure is necessarily more intrusive merely because it occurs in public view, see 452 U.S. at 702 n.16, but in any event detaining someone away from the premises in front of strangers will often be less intrusive than detaining him in the immediate vicinity of the premises in front of loved ones, friends, or neighbors. An occupant may prefer, for instance, that his children do not see him in handcuffs. See *United States* v. *Montieth*, 662 F.3d 660, 663 (4th Cir. 2011). Nor does detention away from the premises present any greater opportunity for exploitation, and accordingly petitioner does not point to a single case that bears out his concern. Of course, if that did occur in some case (unlike this one), courts could find the particular detention unreasonable.

E. Finally, an ironclad geographic limit is artificial, unnecessary, and impractical. The justifications for detention do not suddenly disappear when an occupant leaves the "immediate vicinity" of the premises and drives a short distance down the street. An occupant outside the "immediate vicinity" can flee from police, return to the scene to harm or interfere with officers, or be returned to assist those officers. And whatever petitioner means by the "immediate vicinity," courts will have to make fact-intensive judgments on either his approach or the government's. Far better then that courts undertake the familiar Fourth Amendment inquiry of reasonableness rather than enforce a geographic limit that bears no relation to the interests underlying the *Summers* rule.

Petitioner incorrectly contends that without such a limit, police will detain former occupants wherever they may be found. Three decades of experience since *Sum-*

mers—during which no federal court of appeals has adopted petitioner's proposed limit—provide no evidence of such action. Time and again, officers have witnessed an occupant leaving the premises and conducted a traffic stop a short distance away. Quite simply, petitioner's geographic limit is a solution in search of a problem. Even worse, it would create an entirely new problem by hamstringing officers in their performance of an already difficult task: the safe and efficient execution of search warrants.

ARGUMENT

PETITIONER'S DETENTION INCIDENT TO THE EXECUTION OF A SEARCH WARRANT WAS VALID UNDER THE FOURTH AMENDMENT

In *Michigan* v. *Summers*, 452 U.S. 692 (1981), this Court held that officers executing a search warrant may detain the occupants of the premises while the search is conducted. The Court did not, however, purport to dictate the manner in which such a detention must occur. Consistent with the Fourth Amendment's touchstone of reasonableness, the court of appeals correctly held that officers may detain an occupant who leaves the immediate vicinity of the premises, provided that the detention is conducted as soon as reasonably practicable. That type of detention serves all of the interests identified in *Summers*: it prevents the occupant's flight in the event that incriminating evidence is found, it protects the safety of officers executing the warrant, and it facilitates the orderly completion of the search. Nor is such a detention necessarily more intrusive than detaining the occupant at the premises. Indeed, in many cases detaining the occupant a short distance from the premises will

be substantially less intrusive than detaining him within view of his children or neighbors.

Here, officers were preparing to execute a no-knock warrant for a handgun at the apartment of an alleged drug dealer, when petitioner and a friend—both of whom fit the dealer's description—exited the apartment. Rather than risk detaining petitioner on the scene and alerting others inside the apartment to their presence (and thus vitiating the purpose of the no-knock warrant), officers detained petitioner less than a mile from the apartment, for approximately ten minutes, out of sight of his neighbors. That was a textbook example of a reasonable detention incident to the execution of a search warrant, particularly a warrant for a gun at an unfamiliar residence. Petitioner's strict geographic limit—*i.e.*, officers must detain an occupant in the immediate vicinity of the premises or allow him to leave altogether—bears no logical relation to the *Summers* rule and would frustrate the ability of officers to safely and effectively execute search warrants.

A. Under *Michigan* v. *Summers*, Police Officers Executing A Search Warrant For Contraband May Detain Departing Occupants A Short Distance From The Premises When Reasonably Necessary

This Court held in *Summers* that police officers executing a valid search warrant for contraband may detain occupants who leave the premises. Both *Summers* itself and later cases confirm that the manner in which officers conduct such a detention, including whether they detain an occupant in the immediate vicinity of the premises or a short distance away, is subject to the Fourth Amendment's requirement of reasonableness. Accord-

ingly, no federal court of appeals has adopted petitioner's proposed geographic limit on detention.

1. The reasonableness of a warrantless seizure is determined by balancing the law enforcement interests against the intrusion on personal liberty

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. As this Court often has recognized, "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Kentucky* v. *King*, 131 S. Ct. 1849, 1856 (2011) (brackets in original) (quoting *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006)); see, *e.g.*, *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985) ("The fundamental command of the Fourth Amendment is that searches and seizures be reasonable."); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108-109 (1977) (per curiam) ("The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'") (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19 (1968)).

The reasonableness of a search or seizure is measured by balancing "the degree to which it intrudes upon an individual's privacy" against "the degree to which it is needed for the promotion of legitimate governmental interests." *Samson* v. *California*, 547 U.S. 843, 848 (2006) (quoting *United States* v. *Knights*, 534 U.S. 112, 119 (2001)); see *Illinois* v. *McArthur*, 531 U.S. 326, 331 (2001) (determining the reasonableness of a warrantless seizure by "balanc[ing] the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable"); *Maryland* v. *Wilson*, 519 U.S.

408, 411 (1997) ("[R]easonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.") (internal quotation marks and citation omitted).

That general Fourth Amendment balancing test applies to the manner in which police officer execute a search warrant. See, *e.g.*, *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998) ("The general touchstone of reasonableness which governs Fourth Amendment analysis governs the method of execution of the warrant.") (citation omitted); see also *Los Angeles Cnty.* v. *Rettele*, 550 U.S. 609, 614 (2007) (per curiam) ("In executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search."); *Dalia* v. *United States*, 441 U.S. 238, 257 (1979) ("[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'") (footnote omitted).

2. Balancing those concerns, **Summers** *held as a categorical rule that officers executing a search warrant may detain occupants who leave the premises*

Applying those principles, in *Summers*, *supra*, this Court held that officers executing a search warrant for contraband may detain occupants who are inside or who are leaving the premises to be searched. In *Summers*, police officers encountered an individual leaving a house as they were preparing to execute a warrant to search the house for narcotics, and they detained him inside for the duration of the search. The Court upheld the deten-

tion. 452 U.S. at 705. At the outset, the Court reiterated the "general rule" that the seizure of a person ordinarily must be supported by probable cause. *Id.* at 696. The Court recognized, however, that "some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause." *Id.* at 699.

The *Summers* Court then weighed "the character of the official intrusion and its justification" in the case of a detention incident to execution of a valid warrant to search for contraband. 452 U.S. at 701. Concerning the intrusion, the Court noted that the officers' acquisition of the warrant was "[o]f prime importance." *Ibid.* The Court observed that "[a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there." *Ibid.* Therefore, "[t]he detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself." *Ibid.* Moreover, the Court observed that detention incident to the execution of a warrant "is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." *Ibid.*

Having concluded that the intrusion resulting from a detention was slight, the Court proceeded to find that the justifications for a detention were substantial. See *Summers*, 452 U.S. at 702-703. "Most obvious," the Court noted, "is the legitimate law enforcement interest

in preventing flight in the event that incriminating evidence is found." *Id.* at 702. "Less obvious, but sometimes of greater importance," the Court added, "is the interest in minimizing the risk of harm to the officers." *Ibid.* The Court observed that "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Ibid.* Therefore, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703. In addition, the Court explained that "the orderly completion of the search may be facilitated if the occupants of the premises are present," because the occupants could assist the police by opening locked doors or containers. *Id.* at 703.

The Court also considered the role of the search warrant in "provid[ing] an objective justification for the detention" in the form of "articulable and individualized suspicion." *Summers*, 452 U.S. at 703. The Court reasoned that, when a search warrant for contraband has been issued, "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime." *Ibid.* When someone in the home then departs in the presence of an officer executing the warrant, "[t]he connection of [the] occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Id.* at 703-704.

Of particular relevance here, the Court squarely rejected the notion that the defendant could not be detained because he was not inside the home at the time police executed the warrant. *Summers*, 452 U.S. at 702

n.16. The Court "[did] not view the fact that [the defendant] was leaving his house when the officers arrived to be of constitutional significance." *Ibid.* The Court noted that "[t]he seizure of [the defendant] on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside." *Ibid.* With respect to either occupants inside or outside the premises to be searched, the Court held in *Summers* that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnote omitted).

3. **Summers *and later cases confirm that the manner in which officers conduct such a detention must be objectively reasonable under the circumstances***

In the thirty-plus years since this Court's decision in *Summers*, the rule that *Summers* announced has proven to be both prudent and workable. Professor LaFave has described *Summers* as the "most significant" of the cases in which this Court has "opted for a standardized procedure to avoid the necessity of case-by-case decisionmaking by police and courts," and has concluded that the *Summers* rule "makes eminently good sense." 2 Wayne R. LaFave, *Search and Seizure* § 4.9(e), at 649, 651-652 (3d ed. 1996) (LaFave). This Court has frequently relied on *Summers* in later Fourth Amendment decisions, without suggesting that the *Summers* rule has been difficult to apply in the field or has given rise to abuse by law enforcement officers. See, *e.g.*, *McArthur*, 531 U.S. at 331; *Wilson* v. *Layne*, 526 U.S. 603, 611 (1999); *United States* v. *Sharpe*, 470 U.S. 675, 685-686

(1985); *United States* v. *Place*, 462 U.S. 696, 703, 704 (1983).

Indeed, since *Summers* was decided, this Court has directly addressed the application of the *Summers* rule only twice. In *Muehler* v. *Mena*, 544 U.S. 93 (2005), police officers executing a search warrant at a suspected gang house detained an individual inside the house, Iris Mena, in handcuffs for two to three hours. *Id.* at 96, 100. In upholding Mena's detention as constitutional, the Court first reaffirmed that, under *Summers*, the detention for the duration of the search was "plainly permissible," because "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" *Id.* at 98 (quoting *Summers*, 452 U.S. at 705 n.19). The Court then held that, as a matter of general balancing under the Fourth Amendment, "[t]he officers' use of force in the form of handcuffs to effectuate Mena's detention * * * was reasonable because the governmental interests outweigh[ed] the marginal intrusion." *Id.* at 99.

Two Terms later, the Court decided *Rettele*, in which officers executing a search warrant at a house found in a bedroom two occupants who were of a different race than the suspects sought by police. 550 U.S. at 609-610. The officers ordered the occupants, who had been sleeping unclothed, to stand while the officers secured the room—an action that this Court upheld as reasonable because "[b]lankets and bedding can conceal a weapon, and one of the suspects was known to own a firearm." *Id.* at 614. The Court emphasized that "'special circumstances, or possibly a prolonged detention,' might render a [seizure] unreasonable," but the Court noted that the detention at issue had not been unnecessarily pro-

longed and the officers had "act[ed] in a reasonable manner." *Id.* at 615, 616 (quoting *Summers*, 452 U.S. at 705 n.21).

Taken together, *Muehler* and *Rettele* confirm that when officers executing a search warrant at a residence encounter an occupant of the home, their authority to detain him incident to the search is categorical. But *how* they detain him—whether they restrain him with force (as in *Muehler*), whether they make him remain place or move somewhere else (as in *Rettele*), or whether they stop him in the immediate vicinity of the premises or a short distance away (as in this case)—is a question subject to the Fourth Amendment's ultimate touchstone of objective reasonableness. See, *e.g.*, *United States* v. *Montieth*, 662 F.3d 660, 666 (4th Cir. 2011) ("Montieth counters that any detention incident to the execution of a search warrant must take place inside the residence itself, or at most on the premises. * * * [S]uch an inflexible rule would contravene the ultimate Fourth Amendment touchstone of objective reasonableness.").

4. Accordingly, no federal court of appeals has adopted petitioner's strict geographic limit on detention

In addition to the court below, six other federal courts of appeals—the Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits—have expressly declined to impose an inflexible geographic limit on the *Summers* rule. See *Montieth*, 662 F.3d at 666-669; *United States* v. *Cavazos*, 288 F.3d 706, 711-712 (5th Cir.), cert. denied, 537 U.S. 910 (2002); *United States* v. *Cochran*, 939 F.2d 337, 338-339 (6th Cir. 1991), cert. denied, 502 U.S. 1093 (1992); *United States* v. *Bullock*, 632 F.3d 1004, 1018-1021 (7th Cir. 2011); *United States* v. *Castro-Portillo*, 211 Fed. Appx. 715, 720-724 (10th Cir.) (unpublished),

cert. denied, 552 U.S. 829 (2007); *United States* v. *Sears*, 139 Fed. Appx. 162, 166 (11th Cir.) (per curiam), cert. denied, 546 U.S. 971 (2005). Those courts have consistently recognized that such a limit would be at odds with the reasoning and facts of *Summers*.

At the certiorari stage, petitioner pointed (Pet. 9-10) to older decisions from the Eighth, Ninth, and Tenth Circuits holding unlawful the detention of occupants who had left the premises. See *United States* v. *Sherrill*, 27 F.3d 344 (8th Cir.), cert. denied, 513 U.S. 1048 (1994); *United States* v. *Taylor*, 716 F.2d 701 (9th Cir. 1983); *United States* v. *Edwards*, 103 F.3d 90 (10th Cir. 1996). But none of those decisions did so on the ground that off-premises detention of an occupant is *never* permissible. Rather, each decision examined the particular facts of the case and concluded that the off-premises detention at issue had not served the three interests identified in *Summers*: preventing flight, protecting officers, and facilitating the search. See, *e.g.*, *Edwards*, 103 F.3d at 94 ("Neither of the latter two *Summers* interests were served in any way by Edwards's extended detention."); see also *Sherrill*, 27 F.3d at 346; *Taylor*, 716 F.2d at 707.

Each of those decisions thus applied *Summers* in a way that this Court has since made clear in *Muehler* is incorrect. "An officer's authority to detain incident to a search is *categorical*," *Muehler*, 544 U.S. at 98 (emphasis added), and does not depend on a case-by-case weighing of whether—with the benefit of hindsight—the detention at issue was in fact necessary. In any event, whatever the vitality of those decisions after *Muehler*, not one adopts petitioner's proposed geographic limit on detention. Indeed, petitioner has not pointed to any decision by a federal appellate court holding that occupants outside the "immediate vicinity" of the premises

may never be detained incident to the execution of a valid search warrant. For reasons set forth below, this Court should not be the first so to hold.

B. A Strict Geographic Limit On Detention Would Be Inconsistent With *Summers*

Petitioner rests much of his case on his contention that the *Summers* rule is "an exception to the default mode of Fourth Amendment analysis," because it permits the detention of an individual "without any degree of individualized suspicion." Br. 14-15; see NACDL Br. 5. Because he views *Summers* as a narrow exception to usual Fourth Amendment doctrine, he further contends that "the court of appeals extended the *Summers* rule" by permitting detention a short distance away from the premises. Br. 18 (capitalization and emphasis omitted). Neither contention is correct, and both are squarely at odds with what this Court plainly said in *Summers*.

1. When officers observe an occupant depart premises subject to a search warrant, they have an identifiable and individualized basis to detain him

Petitioner incorrectly contends that the *Summers* rule is unique because it permits "the detention of an individual * * * without any degree of individualized suspicion." Br. 15. As the Court explained in *Summers*, "[t]he existence of a search warrant * * * provides an objective justification for the detention," because "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime." 452 U.S. at 703. When someone in the home then departs in the presence of an officer executing the warrant, "[t]he connection of [the] occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal

activity justifies a detention of that occupant." *Id.* at 703-704. As a result, the Court observed, there is "*articulable and individualized suspicion* on which the police base the detention of the occupant of a home subject to a search warrant." *Id.* at 703 (emphasis added).

The Court recognized that *Terry* and other cases permit certain types of seizures "on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." *Summers*, 452 U.S. at 699. The Court reasoned that, like those other types of seizures, detention incident to the execution of a search warrant constitutes a "limited intrusion[] on the personal security of those detained" and is justified by "substantial law enforcement interests." *Ibid.* Specifically, the Court found that the limited intrusion from detention is outweighed by "both the law enforcement interest[s] and the nature of the 'articulable facts' supporting the detention." *Id.* at 702. It is therefore incorrect to view the *Summers* rule as an exception to usual Fourth Amendment analysis. See Pet. Br. 14-15. To the contrary, *Summers* permits a seizure based on less than probable cause in the context of executing search warrants, based on the "special law enforcement interests" present in that context. *Summers*, 452 U.S. at 700; see 2 LaFave § 4.9(e), at 649.

Accordingly, detention under *Summers* should not be treated differently from other types of seizures, like a *Terry* stop, that may occur on less than probable cause. See 2 LaFave § 4.9(e), at 644-648 (explaining parallels between *Summers* and *Terry*). As with those other types of seizures, the manner in which officers detain an occupant, including whether they detain him in the immediate vicinity of the premises or a short distance away, should be subject to the Fourth Amendment's

requirement of reasonableness. By analogy in the *Terry* context, "some movement of the suspect in the general vicinity of the stop is permissible without converting what would otherwise be a temporary seizure into an arrest," but "police do not have unlimited power to move a suspect subjected to a *Terry*-type stop." 4 LaFave § 9.2(g), at 348 (4th ed. 2004); see *id.* § 9.2(g), at 351 n.245 (citing decisions that have upheld the transportation of suspects a short distance for identification purposes). So too here, officers have some authority to detain an occupant and return him to the scene, but that authority is not unlimited.

The appropriate inquiry is thus whether officers detain an occupant in a location "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. Here, petitioner exited the Lake Drive apartment as officers were preparing to execute a no-knock warrant for a handgun. The officers therefore detained petitioner as soon as practicable a short distance from the apartment, in order to avoid alerting any others inside the apartment to their presence. That is a textbook example of a detention reasonably related to the underlying warrant. It is *petitioner's* request for a strict geographic limit on detention that would set aside "the default mode of Fourth Amendment analysis," Br. 14, by requiring courts to ignore whether a particular detention was conducted reasonably under the circumstances.

2. Summers *rejected a strict geographic limit on where an occupant may be detained*

a. Petitioner recognizes (Br. 20) that in *Summers* this Court viewed "the fact that [the defendant] was leaving his house" as lacking any "constitutional significance." 452 U.S. at 702 n.16. In so doing, the Court necessarily rejected petitioner's core argument: that the rationales for detaining an occupant incident to the execution of a warrant suddenly evaporate once the occupant leaves the premises to be searched. Petitioner attempts to explain away the Court's statement, however, as a *de minimis* exception to a more general rule. According to petitioner, *Summers* generally requires that officers detain an occupant "inside the premises," but this Court recognized an exception "when the initial seizure occurs on the doorstep" because "the rationales supporting a detention * * * operate[] with similar force" in that circumstance. Pet. Br. 20.

Petitioner is entirely correct: the rationales supporting a detention do apply with similar force to an occupant who has recently left the premises. Because that remains true whether the occupant is detained on the threshold of the premises or a short distance away, see *infra*, pp. 31-44, 49-50, petitioner's concession undercuts his case. But as an initial matter, petitioner's reading of *Summers* cannot be squared with the language of the Court's opinion. The Court did not announce a general rule that detention must occur "inside the premises." Pet. Br. 20. Rather, the Court repeatedly referred to detention of "the occupants of the premises," 452 U.S. at 705; see *id.* at 703, by which the Court meant all "eight occupants of the house": the defendant (who was outside the house) and seven other individuals (who were inside the house). *Id.* at 693 n.1. Throughout its opin-

ion, the Court treated those occupants as an undifferentiated group, attaching no "constitutional significance" to whether an occupant was inside or outside the house when officers executed the warrant. *Id.* at 702 n.16.

That makes sense in light of the Court's reasoning. As the Court explained, when a warrant has been issued to search for contraband in a residence, "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime." 452 U.S. at 703. Whether an occupant is inside the home or recently has been seen leaving by officers, he has a "connection * * * to that home" which gives officers "an easily identifiable and certain basis for determining that suspicion of criminal activity justifies" the occupant's detention. *Id.* at 703-704. It is the occupant's observed "connection" to a home subject to a valid warrant—not his physical location at the time he is detained—that makes him subject to detention, and the question then becomes whether officers effect the detention in a reasonable manner. See *id.* at 705 n.21 ("[S]pecial circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case.").

Nor is petitioner's reading of *Summers* consistent with this Court's description of the facts. According to the Court, the detention in *Summers* did not occur "on the doorstep," Pet. Br. 20, but instead "on the sidewalk outside" the house, 452 U.S. at 702 n.16. That factual distinction, of course, was not important to the Court, which viewed as irrelevant the precise location where officers catch up to a departing occupant. But that sort of factual distinction makes all the difference to petitioner. He repeatedly characterizes detention as constitutional only if it occurs in "the immediate vicinity of the

premises." Pet. Br. 20; see, *e.g.*, *id.* at I, 9-12, 22, 27-29, 31. Petitioner does not explain what he includes within the "immediate vicinity," but whatever he means, he is drawing the kind of geographic limit on detention that the Court rejected in *Summers*.[2]

Moreover, the *Summers* Court was well aware of the arguments for a geographic limit on detention. The American Civil Liberties Union (ACLU) filed a brief as amicus curiae and participated in the oral argument in support of respondent (who was the defendant in the case). That brief advances the same arguments as petitioner (and the ACLU as his amicus) in this case. Specifically, it argues at length that the detention of an occupant who already has departed the premises is a severe intrusion on liberty and cannot be justified by the interests in protecting officer safety or preventing interference with the search. See ACLU Br. at 37-47, *Summers*, *supra* (No. 79-1794). In the face of those argu-

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[2] Petitioner suggests that in referring to detention of "occupants of the premises," *e.g.*, 452 U.S. at 705, the *Summers* Court meant "persons who are presently occupying the premises" and not "persons who have formerly occupied them and since departed," Br. 19. That is at odds with the facts of *Summers*, in which the Court used the term "occupant" to refer to the defendant, who was stopped by officers "on the sidewalk outside" the house. 452 U.S. at 702 n.16. It is also at odds with ordinary usage of the term "occupant," as the source quoted by petitioner (Br. 19) recognizes: "[I]f you are confirming your address over the phone and the person on the other end asks, 'And you are still an occupant of 45 Ames Street?' it would be quite ordinary to answer, 'Yes' if that is your address even if you are making the call from outside your home, or as you are driving." Amir Hatem Ali, Note, *Following the Bright Line of* Michigan v. Summers: *A Cause for Concern for Advocates of Bright-Line Fourth Amendment Rules*, 45 Harv. C.R.-C.L. L. Rev. 483, 500 (2010). This case does not present the question of how to apply the *Summers* rule to former or current occupants of a nonresidential building (like a concert hall, see Pet. Br. 19).

ments, the Court stated that whether an occupant had departed the premises was not "of constitutional significance." 452 U.S. at 702 n.16. The Court's statement thus was neither unconsidered nor a silent recognition of some *de minimis* exception. Rather, it was a simple rejection of the geographic limit that this Court is again urged to adopt.

b. Petitioner asserts that the *Summers* Court "did not meaningfully elaborate" on its rejection of a geographic limit, but he does not address what the Court did have to say. Pet. Br. 20. The Court's stated reason for rejecting a geographic limit was that "[t]he seizure of [the defendant] on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside." 452 U.S. at 702 n.16. To be sure, the Court did not proceed to discuss whether the rationales for detention (*e.g.*, preventing flight, protecting officer safety, and facilitating orderly completion of the search) apply equally whether occupants are inside or outside the premises, but the necessary implication of *Summers* is that they do: if the Court had believed that the rationales for detention applied with any less force to a departing occupant, it would have addressed and redrawn the Fourth Amendment balance—not deemed the occupant's location at the time of detention constitutionally insignificant.

The reason why the Court quickly dispatched with a geographic limit is not difficult to surmise. Accepting such a limit would have undermined *Summers* itself. If petitioner were correct (Br. 22-28) that an occupant, once outside the immediate vicinity of the premises, is no longer a threat to officers and is likely to be a hindrance if returned to the scene, the *Summers* Court should have declared that an occupant may choose to

stay and be detained or leave and go free. The Court recognized instead that important interests are served when an occupant is compelled to remain rather than permitted to leave, and that remains true no matter whether officers initially encounter the occupant inside or outside the premises.

C. Substantial Law Enforcement Interests Justify Detaining An Occupant Away From The Premises As Soon As Reasonably Practicable

The Court in *Summers* pointed to three legitimate and substantial law enforcement interests: "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and "the orderly completion of the search," which "may be facilitated if the occupants of the premises are present." 452 U.S. at 702-703. Each of those interests applies with similar force when an occupant is detained a short distance away from the premises. Two other relevant interests, which the Court in *Summers* had no reason to discuss on the facts of that case, can support detaining a departing occupant a short distance from the residence to be searched: officers' interest in avoiding detection by those inside the premises before they execute the warrant, and their interest in executing the warrant only once they are fully prepared.

1. An occupant who has departed the premises may flee from officers

a. In assessing the justifications for detention incident to the execution of a search warrant, the *Summers* Court stated that "[m]ost obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." 452 U.S. at 702. Despite the Court's statement that the interest in pre-

venting flight is both "obvious" and "legitimate," petitioner contends that it is of lesser importance than the other interests in protecting officers and facilitating orderly searches, which petitioner asserts are "the primary justifications for the *Summers* rule." Br. 17-18. At most, petitioner argues, the interest in preventing flight "overlap[s] with, and thereby reinforc[es]," those other interests. *Id.* at 18.

Petitioner's desire to downplay the governmental interest in preventing flight is understandable, for it is "obvious" that an occupant who fears what a search will reveal may attempt to flee from officers, regardless of whether the occupant is inside or outside the premises. That is why in *Summers* the Court deemed the interest in preventing flight a "legitimate" one, and why in later cases the Court repeatedly has recognized that *Summers* treated the prevention of flight as an important interest in its own right. See *Muehler*, 544 U.S. at 98 ("Against this incremental intrusion [in *Summers*], we posited three legitimate law enforcement interests that provide substantial justification for detaining an occupant," among them "preventing flight in the event that incriminating evidence is found.") (quoting *Summers*, 452 U.S. at 702); *Rettele*, 550 U.S. at 614 (same); see also *McArthur*, 531 U.S. at 331 (noting that *Summers* upheld "temporary detention of [a] suspect without [an] arrest warrant to prevent flight and protect officers while executing search warrant").

Petitioner responds (Br. 17-18) that the prevention of flight cannot be an independent interest, because that would allow officers to detain occupants in the hope that an ensuing search would produce probable cause. Petitioner cites only the dissent in *Summers* for that point. See 452 U.S. at 709 (Stewart, J., dissenting) ("If the po-

lice, acting without probable cause, can seize a person to make him available for arrest in case probable cause is later developed to arrest him, the requirement of probable cause for arrest has been turned upside down."). The Court itself squarely rejected the argument. See *id.* at 705 ("Because it was lawful to require [the defendant] to re-enter and remain in the house until evidence establishing probable cause to arrest him was found, his arrest and the search incident thereto were constitutionally permissible.").

As the Court recognized, there is no reason to treat detention under *Summers* differently from other types of seizures justified by special law enforcement interests, such as an investigative stop under *Terry*. One of the reasons for a *Terry* stop is to ensure the suspect's "continued presence so that he can be readily arrested if other investigation in the immediate area further implicates him." 2 LaFave § 4.9(e), at 645. This Court has acknowledged that as a legitimate law enforcement objective. See *Adams* v. *Williams*, 407 U.S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."). As a result, the law enforcement interest in preventing flight, "even standing alone, suffices to support a brief detention in the search warrant context." 2 LaFave, § 4.9(e), at 645 (footnote omitted).

b. Petitioner argues that the interest in preventing flight "is served here only slightly, if at all," because "an individual who has left the scene will ordinarily have no reason to know that a search is imminent—and will therefore have no reason to flee." Br. 29. What petitioner overlooks is that the individual has left the scene

in the presence of officers. An individual is subject to detention only if he has a "connection" to "a home subject to a search warrant," *Summers*, 452 U.S. at 703, and that "connection" typically arises either because officers enter the home and find the occupant inside or they see the occupant leave the home in the process of executing the warrant. In the latter situation, nothing prevents the occupant from seeing the officers, too. Pre-search surveillance is common (so that officers executing the warrant have a sense for the risks they will face), and as petitioner notes (Br. 23-24 nn.7-8), warrants may be executed by groups of officers or a tactical unit. A departing occupant who spots a team of officers is likely to infer that something is afoot and flee the scene.

Petitioner asserts (Br. 23 n.6) that he was not aware of officers' presence here, but the officers had no reliable way of knowing that. Indeed, the *Summers* rule is "categorical" in part precisely so that officers do not have to guess whether a departing occupant has spotted them. *Muehler*, 544 U.S. at 98. And regardless of whether it happened here, it happens in other cases. See *Cavazos*, 288 F.3d at 711 ("[W]hen Cavazos approached the police car and peered at the officers, it would be reasonable to think that he was performing a type of counter-surveillance, after which he drove his truck toward the officers' vehicle in a threatening manner. This conduct warranted the belief that Cavazos would have fled or alerted the other occupants of the residence about the agents."); cf. *State* v. *Madsen*, 5 P.3d 573, 577 (N.M. Ct. App.) ("[B]ecause Defendant was standing only 50 to 100 yards from the motel room, he might have been in a position to observe the officers executing the search warrant."), cert. denied, 4 P.3d 1240 (N.M. 2000) (Table). Occupants engaged in unlaw-

ful activity typically will be sensitive to, and on the lookout for, the presence of police.

Petitioner also ignores the ubiquity of cellular telephones. Even if a departing occupant does not see officers, anyone on the premises or nearby could readily alert him to the search by calling him or sending him a text message. See, *e.g.*, *United States* v. *Young*, 609 F.3d 348, 355 (4th Cir. 2010) ("[D]rug dealers frequently use different cell phones to make and receive calls from their supplier, their customers, and their families."). Here, for instance, officers found several cell phones inside the Lake Drive apartment, in addition to the weapons, body armor, drugs, and drug paraphernalia. See J.A. 181, 202-204, 207-209, 211-212, 215-218. In addition, the confidential informant testified at trial that petitioner owned a cell phone. See C.A. App. A193. Officers could not assume then that petitioner would not learn of the search and attempt to elude them in the future, thus consuming additional law enforcement resources and potentially endangering officers and the public in the process.

2. ***An occupant who has departed the premises may return to harm officers or interfere with the search***

a. The concern for officer safety also justifies detention of a departing occupant away from the premises as soon as reasonably practicable. Executing a search warrant for contraband at a residence is an inherently dangerous task.[3] Where, as here, the warrant authorizes a

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[3] Most warrants for residences are issued to search for weapons, drugs, or both. See William J. Dinkin & Cullen D. Seltzer, *Criminal Law and Procedure*, 35 Univ. of Richmond L. Rev. 537, 539 n.10 (2001) (finding that 80% of search warrants for Richmond in August 2001 involved weapons or drugs); Laurence A. Benner & Charles T. Smar-

search for deadly weapons, those dangers are substantially increased. As the Court therefore has held in its post-*Summers* cases, officers executing a search warrant are entitled to take reasonable precautions to ensure their safety, including the use of coercive force. See *Muehler*, 544 U.S. at 100 (governmental interests are "at their maximum" when "a warrant authorizes a search for weapons"); *ibid.* ("In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants."); see also *Rettele*, 550 U.S. at 614. Indeed, *Summers* itself "stressed that the risk of harm to officers and occupants is minimized 'if the officers routinely exercise unquestioned command of the situation.'" *Muehler*, 544 U.S. at 99 (quoting *Summers*, 452 U.S. at 703).

In other contexts as well, the Court has noted the "weighty interest in officer safety," *Wilson*, 519 U.S. at 413, and upheld limited intrusions on individuals' liberty or privacy as necessary to protect the safety of officers. See, *e.g.*, *Arizona* v. *Johnson*, 555 U.S. 323, 332 (2009) (officers may frisk a passenger during a lawful traffic stop upon reasonable suspicion that he is armed and dangerous); *Ramirez*, 523 U.S. at 71-72 (officers broke a garage window and pointed a gun through the opening to dissuade occupants from rushing toward weapons believed to be in the garage); *Maryland* v.

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kos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 Cal. W. L. Rev. 221, 224 (2000) (finding from a representative sample that approximately 50% of search warrants in San Diego are for drugs). The dangers associated with executing residential search warrants (and searching for weapons or drugs) underscore the importance of permitting officers to detain occupants away from the premises when reasonably necessary to protect officers' safety.

Buie, 494 U.S. 325, 336 (1990) ("protective sweep" of house justifiable based on "reasonable suspicion of danger"); *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) ("[P]rotection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger."); *Mimms*, 434 U.S. at 110 (officers may require the driver to exit the vehicle during a traffic stop because of "the inordinate risk confronting an officer" in that situation).

The lesson of those cases is that when officers have the requisite level of suspicion to justify a search or seizure—as they do when they observe an occupant departing a home subject to a search warrant for contraband—the Fourth Amendment does not generally dictate the particulars of police procedure for officers in the field. Officers on the scene may conduct the search or seizure in a way that in their professional judgment lessens the risk of violence to themselves and the public, provided that they remain within the bounds of reasonableness. To be sure, officers might decide in specific circumstances that an occupant beyond the immediate vicinity of the premises is not likely to return and become violent. But where officers decide that a departing occupant is a continuing threat, or where they foresee the potential for a confrontation, "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23.

b. Petitioner's argument to the contrary (Br. 22-25) rests on an unsupported factual assertion: that once an occupant has left the premises, he is unlikely to return and confront officers. Occupants, however, often return to the premises while a search is ongoing. Here, for instance, petitioner was giving Middleton a ride home so

that Middleton could comply with a court-imposed curfew. Officers followed petitioner for no more than five minutes before they stopped him approximately two blocks from Middleton's home. See J.A. 48, 54, 117. Had the officers not stopped petitioner, it is virtually certain that he would have returned to the Lake Drive apartment while officers were conducting the search. As petitioner observes (Br. 15), completing a search can take up to several hours, which only increases the chances that an occupant will return to the premises while the search is in progress.

Petitioner's argument thus depends on his prediction that an occupant who arrives on the scene will not accost officers or interfere with the search. Unsurprisingly, petitioner's prediction places too much faith in those suspected of criminal activity. Individuals who come upon police searching their residence may threaten violence against, assault, or even kill officers on the scene. See, *e.g.*, Nat'l Ass'n of Fed. Defenders (NAFD) Amicus Br. 13 (describing a case in which "an officer was shot and killed by an individual who arrived at his residence as the police waited to execute the search warrant"); *Jones* v. *State*, 622 S.E.2d 425, 426 (Ga. Ct. App. 2005) (defendant arrived at her brother's house while officers were executing a search warrant, pushed an officer twice in an attempt to get into the house, and began fighting with the officers, necessitating the use of a Taser to subdue her); *State* v. *Batchelor*, 606 S.E.2d 422, 423 (N.C. Ct. App. 2005) (defendant arrived home after officers served a search warrant on his wife, struck an officer with his car, and then led officers on a high speed chase); Dane Schiller & John MacCormack, *Two Border Agents Killed in Ambush*, San Antonio Express-News, July 8, 1998, at 1A (suspect emerged from a cornfield

and fired on officers preparing to conduct a search, killing two of them).

Beyond threatening the safety of officers, individuals who come upon police searching their residence may also interfere with the orderly completion of the search. That requires officers to divert attention and resources away from completing the search in a timely and thorough manner. See, *e.g.*, *Avery* v. *King*, 110 F.3d 12, 13 (6th Cir. 1997) (property owner arrived while officers were executing a search warrant, acted aggressively, and refused to leave despite multiple requests); *Valdez* v. *State*, No. 01-05-821-CR, 2006 WL 3317653, at *1-*2 (Tex. App. Nov. 16, 2006) (defendant arrived mid-search; acted "very belligerent, cursing at officers"; and interfered with an officer's efforts to make an arrest, "striking, kicking, and pulling at [the officer's] arm in an attempt to release [another defendant] from [the officer's] hold"); *State* v. *Seabury*, 985 P.2d 1162, 1163 (Kan. 1999) (defendant arrived mid-search, became "irate," "told police he was not going to allow them to search the house," and "demanded that he be allowed to accompany the police on their search of [the] home"); *Williams* v. *McNeil*, 432 So. 2d 950, 852 (La. Ct. App.) (property owner arrived while officers were searching his home for drugs "and allegedly became boisterous and interfered with the search"), writ denied, 437 So. 2d 1151 (La. 1983).

Individuals arriving at the scene may also attempt to prevent officers from gathering contraband or other evidence. See, *e.g.*, *Poole* v. *State*, No. 12-06-290-CR, 2007 WL 2782746, at *1 (Tex. App. Sept. 26, 2007) (defendant arrived mid-search, began "hollering and cussing" at the officers, and moved "quickly and aggressively" toward an officer who was carrying firearms out

of the residence, telling the officer he "was not going to take [the] gun[s]"); *Commonwealth* v. *Yesilciman*, 550 N.E.2d 378, 382 (Mass. 1990) (defendant arrived mid-search and "attempted to prevent the police officers from gathering certain items of his clothing and attempted to impede the search of his automobile").[4]

c. Petitioner recognizes that "[w]here an individual returns to (or arrives at) the premises while the search is ongoing, lower courts have consistently held that the individual can be detained under the rule of *Summers*." Br. 24 n.9 (citing cases). Petitioner does not appear to take issue with those decisions, but it is hard to see why. If officers may detain a returning occupant who arrives mid-search because of the risk that he will harm officers or interfere with the search, the same analysis should govern at an earlier point in time, when officers know that a departing occupant may return and threaten their safety or impede the search. See, *e.g.*, *People* v. *Glaser*, 902 P.2d 729, 739 (Cal. 1995) ("[P]olice are not required

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[4] One of petitioner's amici purports to rely on empirical data, but its selected data are largely irrelevant. See NAFD Br. 8-19. For instance, it cites recent crime reports by the Federal Bureau of Investigation, but the vast majority of search warrants for contraband are executed by state and local officers. Nor should amicus even expect to find recent federal incidents in which officers failed to detain a departing occupant (on the ground that he was outside the immediate vicinity of the premises) and the occupant returned to harm officers—as the vast majority of circuits expressly permit detention a reasonable distance from the premises and no circuit has forbidden it across the board. See pp. 22-23, *supra*. Amicus points to state laws granting authority to search individuals present at the premises, but the question here is whether officers were permitted to detain petitioner for a brief period, not whether they could search him during that time. As for the police manuals to which amicus points, they generally counsel officers to secure the premises when executing warrants, without addressing in any way the application of the *Summers* rule.

to ignore the danger that persons possibly involved in crime, who leave the premises, may return during the search, with potentially fatal consequences for themselves or the officers."). Officers should not be required to roll the dice that when occupants leave, they will not come back—or that if they do, they will meekly submit to officers' authority.

Perhaps petitioner means that once a returning occupant crosses into the "immediate vicinity" of the premises, he is subject to detention. But that proposition is not clearly supported by all of the decisions he cites (Br. 24 n.9). In *United States* v. *Jennings*, 544 F.3d 815 (7th Cir. 2008), for instance, the defendant "entered the security perimeter surrounding the apartment where the narcotics search was underway," but he "never stepped onto the property being searched." *Id.* at 818. In any event, whatever geographic threshold petitioner has in mind, officers watching an occupant return should not be required to stand idly by until he crosses some imaginary line to detain him. Cf. *Brendlin* v. *California*, 551 U.S. 249, 258 (2007) ("It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.").

Petitioner argues that rather than detain occupants outside the immediate vicinity of the premises, officers could protect their safety simply by "erecting barricades or posting someone on the perimeter." Br. 24. The reasonableness of officers' conduct, however, "does not turn on the availability of less intrusive investigatory techniques." *United States* v. *Sokolow*, 490 U.S. 1, 11 (1989). Defendants "engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have

been accomplished." *Sharpe*, 470 U.S. at 686-687. For that reason, courts "must be careful not to use hindsight in limiting the ability of police officers to protect themselves as they carry out their missions which routinely incorporate danger." *United States* v. *Coates*, 495 F.2d 160, 165 (D.C. Cir. 1974). Moreover, even assuming that the protection of officers "might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render [petitioner's seizure] unreasonable." *Sharpe*, 470 U.S. at 687 (quoting *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973)).

In any event, stationing officers around the premises may be neither practicable nor effective depending on the circumstances. Petitioner assumes that search teams will have sufficient personnel to post sentries; posted sentries always will see returning occupants; occupants will not fire on officers before they can be detained; and occupants will be alone rather than accompanied by others (who may themselves be armed and dangerous). No doubt in many cases those conditions will hold, but the Fourth Amendment does not require officers to take that dangerous gamble. The officers in this case were searching for a semi-automatic weapon, and they could not assume petitioner and Middleton were unarmed. In that situation, it was far more sensible for officers to "exercise unquestioned command of the situation" by detaining petitioner, rather than waiting to see whether he and Middleton would return while the search was in progress. *Summers*, 452 U.S. at 703. Briefly detaining petitioner a short distance from the apartment was an eminently reasonable decision.

3. An occupant who has departed the premises may be returned to assist in the orderly completion of the search

Petitioner argues that detaining an individual who has left the immediate vicinity of the premises "does not materially advance the interest in facilitating the orderly completion of the search," because "the seizure of such an individual will necessarily divert officers" from conducting the search or "creat[e] a distraction" at the scene. Br. 28. The same argument could have been made about detaining all of the occupants in *Summers*. In any event, officers can reasonably decide that the usefulness of detaining an occupant outweighs any diversion or distraction. Although officers will not need assistance opening locked doors or containers during all searches, see *Summers*, 452 U.S. at 703, they will during some searches and it is usually impossible to anticipate in advance which searches those will be. Nor is an occupant returned to the scene likely to prove much of a distraction in light of the fact that, if necessary, he may be placed in appropriate restraints. See *Muehler*, 544 U.S. at 100. Indeed, petitioner does not cite a single case in which his concerns have come to pass.

There are cases, however, in which an occupant detained away from the premises has provided valuable assistance to police. In *Montieth*, for example, officers obtained a search warrant for drugs at a residence occupied by the defendant, Kwan Montieth, as well as his wife and two young children. 662 F.3d at 662-663. "In an effort to minimize trauma to Montieth's family as well as the safety risks of a search," the officers waited for Montieth to drive away from his home, stopped him less than a mile away, and secured his cooperation to execute the warrant. *Id.* at 663. In agreeing to cooperate, Mon-

tieth "asked especially that his children not see him in handcuffs." *Ibid.* Officers then returned Montieth to the home and kept him in their police car while his wife and children departed (without seeing him in handcuffs). *Ibid.* Montieth entered the residence with officers, and after waiving his *Miranda* rights, told them where to locate drugs, firearms, and cash. *Ibid.* As that case demonstrates, detaining an occupant away from the premises can "materially advance the interest in facilitating the orderly completion of the search." Pet. Br. 28.

4. Detaining an occupant away from the premises avoids alerting others inside to the police presence

An additional interest can be served by allowing officers to detain departing occupants outside the immediate vicinity of the premises: the police may avoid alerting anyone still inside the premises to their presence. That is particularly true when circumstances on the scene justify an unannounced entry or where, as here, the police are executing a no-knock warrant that authorizes them to enter the premises without notice. In either situation, officers may execute the warrant without notice to prevent individuals inside the premises from arming themselves, destroying evidence, or attempting to flee. See *United States* v. *Banks*, 540 U.S. 31, 36-37 (2003); *Richards* v. *Wisconsin*, 520 U.S. 385, 394-395 (1997); *Wilson* v. *Arkansas*, 514 U.S. 927, 935-936 (1995). Those important objectives all would be substantially undermined if officers were forced to detain departing occupants immediately outside the premises rather than a short distance away.

Petitioner does not dispute that detaining an occupant on the threshold may alert others inside, giving them the opportunity to arm themselves, destroy evi-

dence, or flee. Petitioner says simply (Br. 27) that if police do not want to run those risks, they should forgo detention altogether. That approach would put officers executing a warrant in an "impossible position." Pet. App. 14a. When officers observed a person of interest leaving a residence subject to a search warrant, they would be required either to detain him immediately (risking that his confederates would harm officers, destroy evidence, or flee) or to allow him to leave altogether (risking that he would flee, return to harm officers or interfere with the search, or at least fail to assist in the search). *Ibid.* As the court of appeals correctly observed, "*Summers* does not necessitate that Hobson's choice." *Ibid.* Because (as even petitioner concedes) officers can detain a departing occupant in the immediate vicinity of the premises, they should be able to detain him a short distance away in order to avoid giving away their presence before executing the warrant.

5. Detaining an occupant away from the premises avoids forcing officers to commence the search prematurely

Similarly, when an occupant leaves the premises as officers are preparing to execute a warrant, petitioner's now-or-never rule would force officers to commence the search before they are ready or forgo the substantial benefits of detention. Executing a warrant requires careful and thorough planning, and if the entire search team is not familiar with relevant details, it increases the chances that officers could damage property, contaminate or overlook evidence, or be injured. See, *e.g.*, Paul B. Weston & Kenneth M. Wells, *Criminal Investigation: Basic Perspectives* 31-51 (3d ed. 1980); Andrew P. Sutor, *Police Operations: Tactical Approaches to*

Crimes in Progress 179 (1976). Here, officers were preparing to execute the warrant when petitioner and Middleton left the apartment. Detectives Sneider and Gorbecki therefore detained the pair a short distance from the apartment, and in the meantime other officers finished their preparations and entered the apartment. That reasonable approach allowed officers to execute the warrant when they were fully prepared.

D. Detaining An Occupant A Short Distance From The Premises Is Not Substantially More Intrusive And May Be Less Intrusive Than Detaining Him In The Immediate Vicinity Of The Premises

1. Whether an occupant of the premises is detained inside the residence, at the threshold, or a short distance away before being returned to the residence, the restraint on his liberty is the same. That restraint on an occupant's liberty for the duration of the search is admittedly a significant one, but it is "surely less intrusive than the search itself." *Summers*, 452 U.S. at 701. Moreover, regardless of where officers detain an occupant, the information they seek "normally will be obtained through the search and not through the detention." *Ibid.* As a result, detaining the occupant a short distance from the premises and returning him to the scene is no more likely to be exploited by officers than is detention inside the premises. And because the occupant is returned to a familiar place, his detention "add[s] only minimally to the public stigma associated with the search itself" and "involve[s] neither the inconvenience nor the indignity associated with a compelled visit to the police station." *Id.* at 702. The reasoning of *Summers* thus applies equally whether a departing occupant is

stopped in the immediate vicinity of the premises or a short distance away.

2. Petitioner argues (Br. 32) that detaining an individual in a public place away from the premises increases the intrusiveness of the seizure. As an initial matter, the Court in *Summers* rejected the notion that a seizure is necessarily more intrusive merely because it occurs in public view. See 452 U.S. at 702 n.16 ("The seizure of respondent on the sidewalk outside was no more intrusive than the detention of those residents of the house whom police found inside."). But assuming that a detention in public view can be more intrusive, it is quite odd to think that detaining someone away from the premises *in front of probable strangers* would be more intrusive than detaining him at the premises *in front of loved ones, friends, or neighbors*. If anything, the latter seems likely to pose a greater indignity.

Indeed, in some cases, detaining an occupant a short distance from the premises will be far less intrusive and far more respectful of personal dignity. In *Montieth*, for example, the defendant "asked especially that his children not see him in handcuffs." 662 F.3d at 663. By detaining the defendant a short distance from his home in that case, "[t]he officers minimized the threat to their safety, [the defendant] spared his children the sight of their father in handcuffs, and his family was protected from the consequences of an unanticipated police entry by force." *Id.* at 668. According to petitioner, however, that entire course of events was unconstitutional from the outset: officers lacked any authority to detain the defendant once he left the immediate vicinity of his home. Petitioner's approach would seriously impair the ability of police to isolate suspects in situations where third parties could be placed in harm's way. At the

least, petitioner's approach is not necessarily less intrusive or more respectful of personal dignity than the government's.

3. Petitioner claims (Br. 33-34) that the incentive for exploitative questioning is greater when the detention occurs away from the premises. Officers did not exploit the detention here. See Pet. App. 16a.[5] Although officers asked petitioner a few basic questions, this Court has expressly held that type of questioning permissible during detention incident to the execution of a search warrant. See *Muehler*, 544 U.S. at 101. Nor does petitioner point to a single case in which officers were found to have exploited the detention. See, *e.g.*, *Bullock*, 632 F.3d at 1021 (finding that officers did not attempt to obtain additional evidence from the defendant during execution of the warrant). Even assuming petitioner could locate such a case, it would hardly prove any widespread abuse. As far as this and other cases reveal, officers detain occupants away from the premises for the legitimate reasons identified in *Summers*.

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[5] Petitioner suggests that, contrary to the findings of the lower courts, Detectives Sneider and Gorecki exploited his detention by asking questions "designed to elicit responses connecting him with the premises being searched." Br. 33. Detective Sneider asked petitioner his name, where he was coming from, and whether he had identification. J.A. 88-89. That type of questioning, which petitioner does not argue prolonged his detention, is expressly permitted by *Muehler*. See 544 U.S. at 101. In any event, in asking where petitioner was coming from, Detective Sneider was confirming that in fact petitioner was a former occupant of the Lake Shore apartment. He was not attempting to elicit additional information, because he and other officers already had seen petitioner exit the apartment. The fact that petitioner answered, "My house," is evidence of his culpability for the charged offenses, not of any impermissible questioning by the officers. J.A. 88.

Petitioner's alarmist prediction fares no better in theory than in practice. It is true that the officers who detain the occupant and return him to the premises will not be the officers who execute the search warrant in the meantime. See Pet. Br. 33. But even when an occupant is detained on the premises, the officers who oversee the detention are often different from those who conduct the search. See, *e.g.*, *Muehler*, 544 U.S. at 96 ("While the search proceeded, one or two officers guarded the four detainees."). Wherever an occupant initially is detained, some officers typically will be able to focus on him—so the absence of exploitation is based not on where the detention commences but on officers' use of detention as a legitimate law enforcement practice. And needless to say, if officers did prolong detention off-site unnecessarily in order to conduct questioning, courts could find the detention unreasonable for Fourth Amendment purposes. See *Montieth*, 662 F.3d at 667 ("Our holding should not be overread. We do not suggest that any detention away from the home to be searched is invariably a reasonable one.").

E. Petitioner's Geographic Limit Is Artificial, Unnecessary, And Impractical

1. By conceding that detention is permissible so long as it occurs within the "immediate vicinity" of the premises, petitioner effectively undercuts his case. Just as the Court in *Summers* recognized that the justifications for detention do not instantly dissipate when an occupant steps out of a house or apartment into the "immediate vicinity," the courts below recognized that the justifications for detention do not disappear when an occupant leaves that "immediate vicinity" and drives a short distance down the street. An occupant outside the "im-

mediate vicinity" can flee from police, return to the scene to harm or interfere with officers, or be returned to assist those officers. See pp. 31-44, *infra*. Petitioner's approach is thus severely underinclusive: it excludes a large number of cases (like this one) that implicate precisely the same interests as his "immediate vicinity" test. Petitioner's geographic game is simply not worth the candle.

Moreover, although petitioner claims (Br. 34-36) the virtues of a rule-based approach, his lines are anything but bright ones. Petitioner does not explain whether, for a house, the "immediate vicinity" extends to the curtilage, grounds, physical boundaries of the property, or any adjoining sidewalk or street; or whether, for an apartment building or housing complex, the "immediate vicinity" extends to a hallway, walkway, stairs, lobby, or other public area. But whatever petitioner intends to include, courts will have to make case-specific, fact-intensive judgments on either his approach or the government's. The difference is that on the government's approach, courts are tasked with a familiar inquiry: reasonableness under the Fourth Amendment. On petitioner's approach, they would be asked to enforce an artificial geographic limit on detention that bears no relation to the interests underlying the *Summers* rule. The constitutionality of detention thus would turn on whether officers caught up to an occupant on his porch, driveway, sidewalk, or city block, rather than whether officers acted reasonably under the circumstances.

2. Petitioner contends (Br. 25) that without an iron-clad geographic limit on the *Summers* rule, it will become an entitlement to detain former occupants of the premises wherever they may be found. But in the three decades since *Summers* was decided—during which no

federal court of appeals has adopted petitioner's proposed limit—there is no evidence that officers have administered *Summers* in that way. Time and again, officers have witnessed an occupant leaving the premises and conducted a traffic stop a short distance away. See, *e.g.*, *Montieth*, 662 F.3d at 663 (eight-tenths of a mile); *Bullock*, 632 F.3d at 1009 (10 to 15 blocks); *Cavazos*, 288 F.3d at 711 (two blocks); *Cochran*, 939 F.2d at 339 ("[a] short distance"); see also *United States* v. *Head*, 216 Fed. Appx. 543, 546 (6th Cir. 2007) (approximately one mile); *Castro-Portillo*, 211 Fed. Appx. at 717 (two blocks); *Sears*, 139 Fed. Appx. at 164 (100 feet). That is true even in cases that have held the detention at issue impermissible. See *Edwards*, 103 F.3d at 94 (three blocks); *Sherrill*, 27 F.3d at 345 (one block).[6] Quite simply, petitioner's geographic limit is a solution in search of a problem.

That is because, as the court of appeals explained, "*Summers* imposes upon police a duty based on both geographic *and* temporal proximity; police must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search." Pet. App. 15a. Those limits are both logically related to the *Summers* rule and meaningful. The former ensures that the individual has the requisite "connection" to the residence to justify detention in the first place. 452 U.S. at 703. And the

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[6] One of petitioner's amici points to *United States* v. *Reinholz*, 245 F.3d 765 (8th Cir.), cert. denied, 534 U.S. 896 and 534 U.S. 933 (2001). See ACLU Br. 7 n.2. In that case, the warrant authorized searching a residence *and* the defendant's person. See *Reinholz*, 245 F.3d at 771. The defendant happened to be at work when officers executed the warrant on him personally, but that does not demonstrate any abuse of the *Summers* rule.

latter ensures that the location of the detention is reasonable for Fourth Amendment purposes. For detention to serve at least some of the interests identified in *Summers*, the occupant typically must be returned to the premises in a timely manner. Detention may therefore be unreasonable if officers wait longer than is necessary or practicable to detain a departing occupant. Here, of course, petitioner does not dispute that officers stopped him at the earliest safe opportunity once he had left the Lake Drive apartment.

3. Petitioner's now-or-never approach suffers from a final flaw: it assumes that officers have the choice of detaining an occupant in the immediate vicinity of the premises (so long as officers are willing to risk alerting others inside to their presence). The circumstances at the scene, however, are often not so simple. The occupant may drive out of a garage attached to the residence without warning, see *Cochran*, 939 F.2d at 339 n.4, or police may be in unmarked cars and, "because of officer safety concerns, it is not the practice of [that police department] to stop vehicles in unmarked police cars," *Head*, 216 Fed. Appx. at 546. For any number of reasons, officers may catch up to a departing occupant outside the immediate vicinity of the premises but close enough that valuable law enforcement interests still would be served by detention. In those situations, petitioner's geographic limit on the *Summers* rule would unnecessarily hamstring the ability of officers on the scene to perform an already difficult task: the safe and efficient execution of search warrants.[7]

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[7] In the lower courts, the government argued that petitioner's detention was permissible under *Terry* and that in any event any error in admitting the fruits of petitioner's detention was harmless in light of other extensive evidence linking him to the apartment. See Gov't C.A.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2012

Br. 31-35; see pp. 7-8, *supra*. As petitioner notes (Br. 39 n.17), if this Court reverses the judgment and remands for further proceedings, the government remains free to renew those arguments on remand.

REPLY BRIEF

RECORD
AND
BRIEFS

No. 11-770

In the Supreme Court of the United States

CHUNON L. BAILEY, A/K/A POLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In its brief, the government takes the position that the Fourth Amendment permits officers executing a search warrant for contraband to detain any individual who has a "connection" to the premises to be searched, as long as "officers effect the detention in a reasonable manner." Br. 28, 34. Applying that proposed rule to this case, the government contends that, where officers seek to detain an individual who has left the immediate vicinity of the premises before the warrant is executed, the detention is valid if it "is conducted as soon as reasonably practicable." Br. 14.

The government's proposed rule would require a radical reconceptualization of *Michigan* v. *Summers*, 452 U.S. 692 (1981), and constitute a breathtaking expansion of law-enforcement authority. In *Summers*, this Court

held that officers executing a search warrant for contraband may detain the "occupants" of the premises while the search is being conducted. The government cannot come close to bearing its burden of showing that the justifications for the *Summers* rule apply with similar force when a former occupant has left the immediate vicinity of the premises to be searched—much less whenever an individual simply has a "connection" to the premises. Tellingly, the government seeks to support its expansion of the *Summers* rule by articulating additional justifications for detentions that take place away from the scene—justifications that are nowhere to be found in *Summers* and are in any event invalid.

By proposing a rule that permits the detention of any individual who has a "connection" to the premises to be searched, the government advocates a freestanding right to seize persons that accompanies the warrant-conferred right to search for and seize contraband. Such a rule cannot be reconciled either with *Summers* or with the original understanding of the Fourth Amendment. As it did in *Arizona* v. *Gant*, 556 U.S. 332 (2009), this Court should reject the government's efforts to extend a Fourth Amendment categorical rule beyond its original justifications. The Court should clarify the proper bounds of the *Summers* rule and reverse the judgment below.

A. In *Michigan* v. *Summers*, The Court Held That Officers Executing A Search Warrant For Contraband May Detain The Occupants Of The Premises Without Individualized Suspicion

1. As the government correctly notes, "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" Br. 16 (citation omitted). This Court, however, has articulated a number of familiar principles that flesh out the "reasonableness" standard. Perhaps fore-

most among them is a principle the government all but ignores: the "general rule" that a seizure of a person is valid only if it is based on probable cause. *Dunaway* v. *New York*, 442 U.S. 200, 213 (1979). Where probable cause exists, an officer has broad authority to conduct the seizure and ensuing detention, free of any temporal or geographic limits.

A seizure based on something less than probable cause is ordinarily unreasonable. But in the exceptional circumstances where such a seizure is permitted, there are strict limits on an officer's authority to conduct the seizure and ensuing detention—limits that correspond with the justifications for permitting the seizure. Thus, where an officer conducts a seizure based on reasonable suspicion pursuant to *Terry* v. *Ohio*, 392 U.S. 1 (1968), there are limits on both the scope and the duration of the detention: the officer must act "diligently" to "confirm or dispel [his] suspicions." *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985). Those limits naturally follow from the justification for a *Terry* detention: namely, to afford an officer who already has individualized suspicion a brief opportunity to determine whether probable cause exists to support a full-fledged arrest. See, *e.g.*, *Adams* v. *Williams*, 407 U.S. 143, 146 (1972).

2. Like *Terry*, *Summers* establishes a rule that permits detention in the absence of probable cause. The government faults petitioner for characterizing *Summers* as a "narrow exception to usual Fourth Amendment doctrine." Br. 24. If petitioner errs, however, he is in good company: in cases going back to *Summers* itself, this Court has repeatedly characterized the *Summers* rule as an "exception" to the default probable-cause (or warrant) requirement. See *Illinois* v. *McArthur*, 531 U.S. 326, 330 (2001); *Wilson* v. *Layne*, 526 U.S. 603, 611

(1999); *United States* v. *Place*, 462 U.S. 696, 702-703 (1983); *Summers*, 452 U.S. at 700.

Although the *Summers* rule resembles the *Terry* rule in that respect, it differs in several others. Most importantly, the *Summers* rule is "categorical" in the sense that it applies regardless of the "quantum of proof justifying detention." 452 U.S. at 705 n.19; see *Muehler* v. *Mena*, 544 U.S. 93, 98 (2005). The government suggests (Br. 24-26) that, where officers have probable cause to believe that contraband will be found on the premises, it necessarily follows that they have reasonable suspicion that any individual with a connection to the premises is engaged in criminal activity. In *Summers*, however, the Court ultimately did not ground its rule on that proposition. And for good reason: it is simply not the case that any individual who is found on (or otherwise connected to) the premises to be searched can reasonably be suspected of involvement in criminal activity. Cf. *Ybarra* v. *Illinois*, 444 U.S. 85, 94 (1979) (holding that an individual's mere presence at a tavern being searched did not justify a search of the individual). As both of this Court's cases applying *Summers* reflect, officers executing a warrant routinely encounter individuals with no apparent connection to the criminal activity being investigated. See *Los Angeles County* v. *Rettele*, 550 U.S. 609, 613 (2007) (per curiam) (upholding the detention of white occupants, when the suspects were black); *Muehler*, 544 U.S. at 95, 98 (upholding the detention of a female occupant, when the suspect was a male gang member).

Instead, as the government acknowledges (Br. 25), the Court ultimately based the rule of *Summers* on "special law enforcement interests," including the interests in promoting the safe and efficient completion of the search. 452 U.S. at 700; see *Rettele*, 550 U.S. at 613-614; *Muehler*, 544 U.S. at 98. The question presented by this

case is whether those "special" justifications apply with similar force to detentions that do not occur in the course of executing the warrant, but instead take place away from the immediate vicinity of the premises to be searched.

B. The Government Proposes A Dramatic Expansion Of The *Summers* Rule

The government contends that the court of appeals in this case did not "extend[] the *Summers* rule" by "permitting detention a short distance away from the premises." Br. 24 (citation omitted). But even the court of appeals repeatedly recognized that this case involves an "extension" of *Summers*. See, *e.g.*, Pet. App. 10a, 12a. And in *Summers* itself, this Court unquestionably did not adopt the rule the government now proposes: namely, that the Fourth Amendment permits the detention of any individual with a "connection" to the premises to be searched, as long as officers effect the detention in a reasonable manner.

1. a. In *Summers*, the Court noted on at least six occasions that it was establishing a rule governing the detention of the "occupants of the premises" while officers are executing a search warrant for contraband. See 452 U.S. at 701-705. The Court did not extend the rule to all "residents" or "inhabitants" of the premises, or all persons associated with the premises, as one would expect if the Court had adopted the government's proposed rule. And at least in the text of the relevant section of the opinion, the Court gave no indication that its rule extended not just to persons who are presently occupying the premises, but also to persons who have formerly occupied them and since departed. See *ibid.* Instead, the Court explained that "it is constitutionally reasonable to require [a] citizen to *remain* while officers of the law ex-

ecute a valid warrant to search his home," *id.* at 705 (emphasis added), and that it was a person's status as an "occupant" that provided the requisite "connection" to justify the detention, *id.* at 703-704.

The government correctly notes (Br. 20) that "[t]his Court has frequently relied on *Summers* in later Fourth Amendment decisions." But the government does not dispute that, in the nearly two dozen decisions that have cited *Summers*, this Court has *not once* suggested that a search warrant for a particular location justifies a detention that occurs away from that location. See Pet. Br. 19. Instead, in applying the rule of *Summers*, the Court has stated that the rule is triggered when the detained individual "was an occupant of [the premises] *at the time of the search*." *Muehler*, 544 U.S. at 98 (emphasis added).

b. In arguing that *Summers* "dispatched with a geographic limit" on detentions incident to the execution of a search warrant (Br. 30), the government relies entirely on a single footnote in the Court's opinion—which it proceeds to cite at least thirteen times. See Br. 6, 12, 13, 20, 27, 28, 29 n.2, 30, 47 (citing *Summers*, 452 U.S. at 702 n.16). Like Congress, however, this Court does not "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). In the cited footnote, moreover, the Court did not extend its categorical rule to any situation in which a former occupant has left the scene—much less to any situation in which an individual simply has a "connection" to the place to be searched. Instead, the Court at most implied that, on the facts of the case before it—where officers "encountered [the defendant] descending the front steps" as they were preparing to go in, 452 U.S. at 693, and the initial seizure took place just outside the house to be searched—the justifications for a detention applied with similar force as when the detention occurs entirely inside the house. *Id.*

at 702 n.16.[1] As the government ultimately concedes, therefore, the footnote at best provides that "the justifications for detention do not instantly dissipate when an occupant steps out of a house or apartment into the 'immediate vicinity.'" Br. 49. That is nothing more than a *de minimis* exception to the rule stated in the text; it is certainly not a wholesale expansion of it.

2. In arguing for its untenably broad reading of *Summers*, the government elides the qualitative distinction between the detention in *Summers* and the detention at issue here. Petitioner was not encountered by officers in the immediate vicinity of the premises as they were in the course of executing the warrant. Instead, the evidence suggests, and the government does not dispute, that the search was specifically timed to justify the detention—with one set of officers conducting the detention away from the premises and another set of officers simultaneously executing the search warrant at the premises. See J.A. 126-127. The question presented by this case is whether the justifications for the *Summers* rule apply with similar force to the category of cases where the detention and the search occur discretely and in different locations. As we will now explain, the government has failed to show that they do.

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[1] The government repeatedly notes that the detention in *Summers* occurred on the "sidewalk" outside the house. See Br. 12, 20, 28, 29 n.2, 30, 47. But at oral argument, counsel explained that the defendant was detained on a walk that ran from the front steps of the house down to the public sidewalk running along the street—*i.e.*, on his own property. See Oral Arg. Tr. at 41-42, *Summers*, *supra* (No. 79-1794), *available at* 1981 U.S. Trans. LEXIS 81.

C. The Justifications For The *Summers* Rule Do Not Support The Detention Of A Former Occupant Who Has Left The Immediate Vicinity Of The Premises To Be Searched

The appropriate analytical framework for this case is supplied by the Court's recent decision in *Gant*, *supra*. There, the Court explained that, in "defin[ing] the boundaries of" a Fourth Amendment categorical rule, it should "ensure[] that the scope of [the rule] is commensurate with its purposes." 556 U.S. at 339. *Gant* therefore makes clear that, in determining whether to extend the categorical rule of *Summers* to detentions that occur away from the scene of the search, the Court should analyze the applicability of the justifications that it articulated in adopting that rule. It naturally follows that the government, as the party seeking to extend the categorical rule, bears the burden of showing that the justifications are applicable in the mine run of cases to which the rule would be extended.

Remarkably, the government does not so much as cite Gant *in its brief.* It is unclear whether the government's omission is attributable to some unstated theory as to why *Gant* is distinguishable, or merely to a sense of discomfort at the closeness of the analogy. But whatever the reason, the government does not dispute that *Gant* provides the correct analytical framework here. And that framework compels a comparable result here as well. Because the government has failed to demonstrate that the justifications articulated by this Court in *Summers* apply with similar force when a former occupant has left the scene, much less when an individual simply has a "connection" to the place to be searched, the government's proposed extension of the *Summers* rule should be rejected.

1. Most importantly, the detention of an individual who has left the immediate vicinity of the premises to be searched does not materially advance the two primary justifications for the *Summers* rule: minimizing the risk of harm to the officers executing the warrant and facilitating the orderly completion of the search. See *Rettele*, 550 U.S. at 614; *Muehler*, 544 U.S. at 102 (Kennedy, J., concurring).

a. At the certiorari stage, the government contended that the detention of an individual whom officers see leaving the scene is justified on the ground that such an individual could subsequently learn of the search and then return to disrupt it. See Br. in Opp. 11-12. The government, however, fails to identify a single case presenting such a scenario. That is unsurprising. When officers encounter an individual in the course of executing a search warrant (whether inside the premises or in the immediate vicinity), that individual will naturally be aware of the officers' presence—and their intentions. But when an individual has left the immediate vicinity of the premises to be searched, he will ordinarily be unaware of the presence of police, because officers do not usually advertise their presence before executing the warrant (as the government does not dispute). And even if the individual later learns of the ensuing search, it would be the rare and foolhardy individual who deliberately returns in an attempt to overpower an entire search team.

In its merits brief, the government tries a different, and more ambitious, tack: it seeks to justify the detention of any individual who has a "connection" to the place to be searched on the ground that "[i]ndividuals who come upon police searching their residence" will often confront them. Br. 38. To begin with, the government points to no statistical evidence to support its premise, as

it has previously done in advocating broad readings of analogous categorical rules. See, *e.g.*, U.S. Br. at 10-11, *Gant*, *supra* (No. 07-542). And what statistical evidence does exist suggests that violent confrontations between officers and individuals arriving at the scene are relatively rare. See Pet. Br. 26 n.11; NAFD Br. 9-14. The government cites only four anecdotal examples from the last fifteen years, most of which are facially distinguishable from the scenario the government posits. See Br. 38-39.

To be sure, the execution of a search warrant more generally is a dangerous enterprise; it was for that reason, among others, that the Court adopted the *Summers* rule in the first place, and it is for that reason that officers typically execute warrants with overwhelming force. But to the extent individuals who arrive at the scene pose a specific threat to officers executing the warrant, the government does not dispute that officers can and do mitigate that risk by taking routine precautions, such as erecting barricades or posting someone on the perimeter or at the door. And to the extent some residual risk persists, the more immediate and obvious solution would be to make clear that the rule of *Summers* applies to individuals *when they arrive at the scene*—as lower courts have consistently done. See Pet. Br. 24 n.9.

The government offers no justification for an additional, prophylactic extension that would permit officers to detain any individual who is seen leaving the scene—much less any individual who has a "connection" to the place to be searched—based on the mere *possibility* that the individual would return while the search is ongoing, evade any precautions, and commit acts of violence against the executing officers. Cf. *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987) (noting that exceptions to default Fourth Amendment principles are permissible only when "special needs * * * make the warrant and

probable-cause requirement impracticable") (citation omitted). Nor does the government account for the offsetting risks of carrying out such a detention. See Pet. Br. 25-26.

The government shows its true colors when it contends that officers should be permitted to effectuate detentions pursuant to *Summers* "where [they] decide that a departing occupant is a continuing threat, or where they foresee the potential for a confrontation." Br. 37. The Constitution does not permit the government to detain an individual just because an officer does not like the look of him, or has a hunch he may later become violent. In the absence of articulable suspicion, the government's interest in minimizing the risk of harm to officers executing a search warrant does not justify such an expansive power to detain.

b. The detention of an individual who has left the scene also does not materially advance the related interest in facilitating the orderly completion of the search. The government does not contest the self-evident proposition that an individual who is not present at the scene cannot interfere with the efficient execution of the search. Instead, the government disputes the collateral proposition that the detention of an individual who has left the scene will divert police resources from the completion of the search. See Br. 43. In so doing, however, the government once again ignores the qualitative distinction between the detention in *Summers* and a detention of the type at issue here. Where the detention does not occur in the course of executing the warrant but instead occurs away from the premises to be searched, a different set of officers will necessarily effectuate the initial seizure—officers who might otherwise assist in conducting the search. And where officers do not encounter the detained individual at the scene but rather return

him there, they create a distraction that would not otherwise have existed.

Citing *United States* v. *Montieth*, 662 F.3d 660 (4th Cir. 2011), the government contends that the detention of an individual who has left the scene is justified because such an individual may choose to "cooperate" by consenting to the manner of executing the warrant. Br. 43-44. But the government cites no authority for the perverse notion that the Fourth Amendment permits the involuntary detention of an individual for the purpose of obtaining his consent, and we are aware of none. The unusual facts of *Montieth* aside, one might well doubt the likelihood that a detention would lead to a genteel parley between officer and detainee culminating in consent. And the government's contention that a detention is justified by the possibility of cooperation is difficult to square with its contention that a detention is justified because any individual with a "connection" to the place to be searched poses a potential threat to officers. See pp. 9-11, *supra*.

2. The government additionally relies on the remaining interest articulated in *Summers*: the interest in preventing flight in the event that incriminating evidence is found. Br. 31-35. But apart from reciting the holding of *Summers* (Br. 33), the government offers no answer to the fundamental flaw with relying on preventing flight as a freestanding basis for detention. Unlike the interests in promoting the safe and efficient completion of the search, the interest in preventing flight is not a "special" law-enforcement interest; it is a decidedly ordinary one. As such, it alone cannot justify an exception to the default requirement of probable cause. Permitting a detention to be based on an interest in preventing flight would allow officers to advance the point of detention from the point at which they *have* probable cause to the

point at which they begin a search that they *hope will produce* probable cause.

The government's reliance on the interest in preventing flight suffers from an additional flaw. The government does not dispute that, when an individual has left the immediate vicinity of the premises to be searched, he will ordinarily, if not always, be unaware of the presence of police. Nor does the government dispute that officers can take other steps to ensure that an individual who is leaving the scene does not flee—such as following that individual and then detaining him if incriminating evidence is uncovered during the search. Instead, the government primarily argues that, because of "the ubiquity of cellular telephones," an individual who has left the scene may be alerted to the presence of officers by another party, thus prompting the individual to flee. Br. 35. But the problem with that hypothetical is that it proves too much: the resident of a house that is being searched could just as easily receive a call when he is at work as when he is leaving the house on the way to work. See, *e.g.*, Pet. Br. 29-30; ACLU & Cato Br. 6-7.

Faced with this slippery slope, the government slides to the bottom of it. The government proposes a rule under which any individual who has a "connection" to the premises to be searched may be detained pursuant to *Summers*—including, but concededly not limited to, individuals who are seen leaving the scene. See, *e.g.*, Br. 34 (stating that the requisite connection will "typically" arise because an individual has been found at the scene or seen leaving it). That rule has the virtue of theoretical consistency but the vice of astonishing overbreadth. And it would constitute a dramatic expansion of the rule that this Court adopted in *Summers*. The Court should reject the government's proposal. When properly understood, the justifications articulated by the Court for the

original *Summers* rule do not apply with similar force when a former occupant has left the scene—much less when an individual simply has a "connection" to the place to be searched.

3. Perhaps recognizing the difficulty in relying on the existing justifications for the *Summers* rule, the government articulates two additional justifications not found in *Summers* itself. Those justifications are equally unavailing.

a. The government first contends that it has an interest in "avoid[ing] alerting anyone still inside the premises to [officers'] presence." Br. 44. To the extent the government invokes that interest here, however, it argues only that detaining an individual who has left the scene is less likely to alert anyone still inside *than detaining that individual at the scene. Ibid.*

That argument is nothing more than a repackaged version of the "Hobson's choice" argument advanced by the court of appeals. See Pet. App. 14a. And it suffers from the same flaw: "it assumes that, one way or another, the [detention] must take place." *Thornton* v. *United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring in the judgment). If officers are concerned about alerting others who may still be inside as to the imminent search, they have an obvious additional option: they can choose not to detain the departing individual at all. For purposes of assessing whether a detention away from the scene is justified under *Summers*, that option, rather than a detention at the scene, is surely the relevant point of comparison.

Contrary to the government's characterization, moreover, detention under petitioner's proposed rule is not a "now-or-never" proposition; instead, it is merely a now-or-later one. Br. 45. If officers wish to execute the warrant before a departing individual returns, they can

simply keep tabs on him in the meantime, thereby facilitating a subsequent detention in the event that incriminating evidence is found. In the alternative, officers can wait to execute the warrant until the individual returns, thus ensuring that they will be able to detain him on the premises under *Summers*. The government's contrary argument rests on the premise that officers have a free-standing entitlement to detain anyone with a "connection" to the premises to be searched—a premise that *Summers* does not support and this Court should reject.

b. The government next contends that it has an interest in "avoid[ing] forcing officers to commence the search prematurely." Br. 45. But once officers initiate a detention pursuant to *Summers*, they cannot bide their time before executing the warrant. Instead, they must do so simultaneously, because *Summers* authorizes officers to detain only for the duration of the search; it does not authorize them to detain first and search later. See 452 U.S. at 705. Indeed, the evidence suggests that the police may have *accelerated* the search in this case, if only modestly, precisely in order to provide a justification for the detention. See J.A. 126-127.

Again, if officers are concerned about commencing the search before they are ready, they have an additional option: they can choose not to detain the departing individual and wait to execute the warrant. But it is nonsensical to say that a proposed rule that would have the effect of requiring the immediate execution of the warrant as a condition for detention serves an interest in avoiding premature execution. Because the government cannot identify any valid justification for the categorical authority to detain a former occupant who has left the scene, much less an individual who simply has a "connection" to the place to be searched, this Court should reject its proposed expansion of the *Summers* rule.

D. The Detention Of A Former Occupant Who Has Left The Immediate Vicinity Of The Premises To Be Searched Is More Intrusive Than A Detention Covered By The *Summers* Rule

Even if the government could identify a valid justification for its proposed expansion of the *Summers* rule, such a justification would be outweighed by the correspondingly more intrusive nature of a detention that takes place away from the scene.

1. The government does not dispute that, where an individual is initially seized away from the immediate vicinity of the premises to be searched, he will likely be detained in full public view for at least several minutes—as petitioner was here. Nor does the government dispute that, where officers decide to return the individual to the premises, he is likely to be subjected to the additional indignities of being placed in handcuffs and being transported in a police car—as petitioner also was here. Such a detention will almost always be more intrusive than the detention that took place in *Summers*, where the public component of the seizure just outside the house was *de minimis*. A detention of the type at issue here "produce[s] all the indignity of an arrest"—but without the justification of probable cause. *Commonwealth* v. *Charros*, 824 N.E.2d 809, 816 (Mass.), cert. denied, 546 U.S. 870 (2005).

The government contends that "it is quite odd to think that detaining someone away from the premises *in front of probable strangers* would be more intrusive than detaining him at the premises *in front of loved ones, friends, or neighbors*." Br. 47. But that contention is at war with *Summers*. There, the Court heavily relied on the proposition that a detention that occurs inside the premises "could add only minimally to the public stigma associated with the search itself." 452 U.S. at 702. And

many detentions, like petitioner's, will involve *both* an initial detention away from the premises *and* a subsequent detention at the premises. Although an initial detention away from the premises did lead to a consensual entry in one case, see *Montieth*, 662 F.3d at 662-663, that hardly supports the government's assertion that a detention away from the premises "will be far less intrusive and far more respectful of personal dignity" more generally, Br. 47—especially because the initial detention in that case was just as intrusive as the detention here. See *Montieth*, 662 F.3d at 663 (noting that the defendant was pulled over, placed in handcuffs, and transported back to the scene in a police car).

2. The government disputes petitioner's contention that the potential for exploitative questioning is greater where the initial seizure occurs away from the scene. See Br. 48-49. In so doing, however, the government does not directly challenge the premise for that contention: namely, that, where the detention of a former occupant and the execution of the search warrant occur at entirely different locations, different officers will necessarily be required to carry out both tasks, with the result that the officers conducting the detention will from the outset focus solely on the detained individual.

It is true that this Court's decision in *Muehler* permits officers effecting *Summers* detentions to conduct questioning for the duration of the search. See 544 U.S. at 101. The government's proposed rule, however, creates a far greater potential for officers to "exploit[]" *Summers* detentions "in order to gain more information," rather than to promote the safe and efficient com-

pletion of the search. *Summers*, 452 U.S. at 701.[2] The intrusiveness of a detention that occurs away from the scene, and the potential for exploitation, provide additional reasons to reject the government's proposed rule and reaffirm *Summers*' limited scope.

E. The Government's Expansion Of The *Summers* Rule Is Flawed For Additional Reasons

Having spent most of its brief resisting the application of a geographic limit to the *Summers* rule, the government ultimately proposes a similar limit of its own. The government contends that the Fourth Amendment permits the detention of any individual who has a "connection" to the premises to be searched, as long as "officers effect the detention in a reasonable manner." Br. 28, 34. Applying that general rule to the detention of a former occupant who has left the scene, the government contends that the detention is valid as long as it "is conducted as soon as reasonably practicable." Br. 14. The government's standard suffers from several additional flaws.

1. a. The government's "as soon as reasonably practicable" limit would be far less administrable than petitioner's "immediate vicinity" limit, because it would introduce the very case-by-case analysis that a categorical rule seeks to avoid. In his opening brief, petitioner predicted that such a standard would lead to litigation in which parties armed with Google Maps would contest whether a departing occupant could have been pulled over more quickly. See Pet. Br. 35. But petitioner could

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[2] At the suppression hearing, Officer Gorbecki testified that the officers' motivation in detaining petitioner and Bryant Middleton was "[t]o identify them and see what their purpose was for being at the residence." J.A. 47.

not have guessed how quickly his prediction would come to pass. In its brief, the government asserts that the officers in this case followed petitioner's car "for a total distance of approximately seven-tenths of a mile" and did not pull him over sooner because the road he was driving on is a "five-lane highway." Br. 4. *Those factual assertions do not appear in the record.* And even assuming, *arguendo*, that the officers *in this case* conducted petitioner's detention as soon as was reasonably practicable, there can be no doubt that the government's standard will provide little guidance to officers and "generate[] a great deal of uncertainty, particularly for a rule touted as providing a 'bright line.'" *Gant*, 556 U.S. at 346.[3]

The government contends that petitioner's "immediate vicinity" limit is "anything but [a] bright one[]." Br. 50. But the government fails to cite a single actual case in which application of the "immediate vicinity" limit would be difficult. And while clever lawyers can conjure up tough hypotheticals with regard to almost any facet of a bright-line rule, the "immediate vicinity" limit is closely analogous to the geographic limits this Court has incorporated in other Fourth Amendment categorical rules. See, *e.g.*, *Gant*, 556 U.S. at 346 (permitting a vehicle search incident to arrest only where, *inter alia*, the arrestee is within "reaching distance" of the passenger compartment); *Maryland* v. *Buie*, 494 U.S. 325, 334 (1990) (categorically permitting a protective sweep incident to arrest only of the area "immediately adjoining the place of arrest"); *Chimel* v. *California*, 395 U.S. 752,

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[3] Throughout its brief, the government notes that the officers detained petitioner a "short distance" from the apartment. But the government does not explain what that means, and it does not appear to be advocating that as the appropriate legal standard.

763 (1969) (permitting a search incident to arrest only of the area "within [the arrestee's] immediate control").

b. In advancing its "as soon as reasonably practicable" limit, the government makes no effort to explain why it matters for Fourth Amendment purposes how quickly officers effectuate a detention *after* a former occupant has left the scene. Indeed, if officers may detain an individual incident to the execution of a search warrant as long as the individual simply has a "connection" to the premises to be searched, where officers seize the individual would seem to be entirely irrelevant. Unlike other limits on the manner in which a detention is effectuated (such as the prohibition on the use of excessive force), a limit on the speed with which officers effectuate the detention serves no identifiable Fourth Amendment value. By contrast, a rule that permits officers to detain only those individuals they encounter inside the premises or in the immediate vicinity strikes an appropriate balance between the need to provide clear guidance, on the one hand, with the need to tailor the applicable categorical rule to the justifications that underpin it, on the other.

2. When the window dressing of the "as soon as reasonably practicable" limit is stripped away, it bears underscoring that the government's proposed rule would authorize the detention, incident to the execution of a search warrant, of any individual who has a "connection" to the premises to be searched. The government makes no effort to reconcile its rule with the original understanding of the Fourth Amendment, and for good reason. The government's rule would effectively create a police entitlement to seize persons that accompanies the warrant-conferred right to search for and seize contraband—notwithstanding the Fourth Amendment's requirement that a warrant "particularly describ[e] the

place to be searched, and the persons or things to be seized." The ensuing detentions would no longer be "incident" to the execution of the search warrant in any meaningful sense; every search warrant would effectively be transformed into a search-and-seizure warrant, only without probable cause to support the seizure.

Given the absence of any founding-era evidence that officers executing search warrants *ever* engaged in the practice of detaining the occupants of the premises, much less the practice of detaining individuals who were simply known to be associated with the premises, this Court should be loath to confer upon officers such expansive authority to conduct suspicionless detentions. Like the rule for vehicle searches incident to arrest, the *Summers* rule should be treated not as a "police entitlement," but as an "exception" of limited scope that must be "justified by [its underlying] rationales." *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part).

In short, the government's expansive approach would "untether the [*Summers*] rule from the justifications underlying [it]," *Gant*, 556 U.S. at 343, and "abandon[] [its] constitutional moorings," *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (citation omitted). The court of appeals erred by sustaining the detention in this case under *Summers*, and its judgment should be reversed.

* * * * *

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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Supreme Court of the United States

CHUNON L. BAILEY, A/K/A POLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE CATO INSTITUTE, AND THE NEW YORK CIVIL LIBERTIES UNION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, pursuant to *Michigan* v. *Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed.

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. In furtherance of that mission, the ACLU has participated in numerous cases before this Court raising Fourth Amendment issues, both as direct counsel and as amicus curiae, including *Michigan* v. *Summers*, 452 U.S 692 (1981), which is central to the issues presented here. The New York Civil Liberties Union (NYCLU) is a statewide affiliate of the national ACLU.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual Cato Supreme Court Review. This case is of central concern to Cato because the protections of the Fourth Amendment are part of the bulwark for liberty that the Framers set out in the Constitution.

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[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court has long recognized "the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan* v. *Summers*, 452 U.S. 692, 700 (1981). As applied to both searches and seizures, the probable cause requirement serves as a critical safeguard against "rash and unreasonable interferences with privacy." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

Given the historical importance of the probable cause requirement in protecting individual liberty, *Summers*, 452 U.S. at 697, this Court has recognized exceptions to that requirement in only a "few specifically established and well-delineated" situations, *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (internal quotation marks omitted). And it has carefully policed the boundaries of those exceptions to "ensure that the[ir] scope ... is commensurate with [their] purposes." *Id.* at 339; *see id.* at 348; NACDL Br. 13-14. In *Summers*, the Court thus recognized only a "*limited* authority to detain the *occupants* of the premises while a proper search is conducted." 452 U.S. at 705 (emphasis added); *see Muehler* v. *Mena*, 544 U.S. 93, 98 (2005).

In this case, as Petitioner has explained (Br. 21-34), the court of appeals extended *Summers* to uphold a far more intrusive seizure without probable cause in circumstances where the justifications supporting *Summers* do not apply. More disturbingly, as discussed below, the court's reasoning places no limit on the reach of police authority to detain. If accepted, the court's analysis would authorize countless unreasonable seizures without probable cause, no matter how embarrassing or intrusive—in effect converting a search warrant

describing one "place to be searched," U.S. Const. amend. IV, into a roving "general warrant" to detain any former occupant associated with that place, anywhere.

Perhaps recognizing the breadth of its holding, the court of appeals posited that a seizure should occur "as soon as practicable" after the occupant has left the premises to be searched. Nothing in that formulation, however, supplies the effective limiting principle that is lacking in the court's analysis. The "as soon as practicable" standard is riddled with substantive flaws: it has no principled basis, cannot be squared with *Summers*, and serves none of the interests underlying the Fourth Amendment. And as a practical matter, it provides no guidance to or constraint on law enforcement and no administrable rule for courts to apply. It thus cannot be relied on to prevent the limitless range of detentions that would be justified under the court of appeals' reasoning.

Nor is the court's expansive reading of *Summers* necessary to protect any legitimate law enforcement interest. Police have ample tools at their disposal to secure "unquestioned command" of any house being searched, *Summers*, 452 U.S. at 702-703, and seizing an individual somewhere else merely because he previously occupied that house does nothing to further that end. At the same time, police have no legitimate interest in detaining a presumptively innocent person pending a search merely because they suspect or hope the search might yield evidence of crime. The Court should reverse the judgment below to ensure that the narrow exception recognized in *Summers* does not swallow the probable cause requirement or provide an entitlement for police to detain based on nothing more than anticipation of probable cause that does not yet exist.

ARGUMENT

I. THE COURT OF APPEALS' EXTENSION OF *SUMMERS* WOULD PERMIT DETENTION WITHOUT PROBABLE CAUSE IN AN UNACCEPTABLY BROAD RANGE OF CASES

With "roots that are deep in our history," *Michigan* v. *Summers*, 452 U.S. 692, 697 (1981) (quoting *Henry* v. *United States*, 361 U.S. 98, 100 (1959)), the Fourth Amendment was adopted in part as a repudiation of the pre-Revolutionary practice of "general warrants"—roving authorizations to arrest or search anyone suspected of wrongdoing. *Henry*, 361 U.S. at 100-101; *see Boyd* v. *United States*, 116 U.S. 616, 624-626 (1886), *abrogated on other grounds by Warden, Md. Penitentiary* v. *Hayden*, 387 U.S. 294 (1967). The Fourth Amendment establishes the general rule that "an official seizure of the person must be supported by probable cause, even if no formal arrest is made." *Summers*, 452 U.S. at 696; *see also, e.g.*, *Whren* v. *United States*, 517 U.S. 806, 809-810 (1996). Probable cause is established only when the inferences that may be made in a "particular factual context[]" justify the specific search in question, *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983), and must be determined, at some point, by a neutral judicial officer, *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968); *McDonald* v. *United States*, 335 U.S. 451, 455-456 (1948). These requirements play a vital role in protecting individual liberty and privacy from unreasonable government intrusion.

In light of the important values underlying the probable cause requirement, this Court has insisted that the scope of any exception should be commensurate with, and limited by, the justifications for the exception. *Arizona* v. *Gant*, 556 U.S. 332, 339 (2009). And it has steadfastly declined to extend any exception

when doing so would "untether the rule from [its] justifications," *id.* at 343, or permit such "intrusive" seizures as "would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause," *Dunaway* v. *New York*, 442 U.S. 200, 213 (1979); *see* NACDL Br. 13-14.

Contrary to these tenets, the court of appeals' reasoning in this case lacks any limiting principle that would maintain an outer boundary on the *Summers* exception. To the contrary, the open-ended rationales on which the court relied in extending *Summers* to the facts of this case would equally justify its extension to any number of situations far more egregious than this case, in which detention without probable cause would be patently unreasonable.

The court of appeals found that "[a]t least two" of the law enforcement interests identified in *Summers* justified Petitioner's detention: "prevention of flight" and "minimizing the risk of harm to the officers" conducting the search. Pet. App. 14a n.6 (internal quotation marks omitted). In particular, the court reasoned that letting Petitioner drive away would have "risk[ed] the inability to detain him if incriminating evidence was discovered," *id.* at 14a, while detaining Petitioner at the house would have risked "alerting other possible occupants" to the police presence, potentially precipitating violence or destruction of evidence, *id.* at 15a. To this reasoning, the government adds that detaining a former occupant and returning him to the scene may help "facilitate the 'orderly completion of the search.'" Opp. 9. And the government speculates that even though Petitioner was unaware of the imminent search when he left, "anyone on the premises or nearby could readily alert [him] to the search by placing a call to his cell phone or sending him a text message," prompting him

either to flee or to "suddenly return—possibly armed and with the assistance of others—to obstruct the search." *Id.* at 11-12.

Once the interests in preventing flight and securing officer safety are thus construed to support the detention of persons who are neither present for nor aware of the search, they cease to limit the *Summers* exception in any meaningful way. The analysis offered by the government and the court of appeals would permit police to detain a man seen leaving his home on his way to the supermarket, even if he were unaware of any police presence, merely because he was seen leaving a house that the police intended to search. Such a detention would be justified under that reasoning by the law enforcement interests in preventing flight (if he were tipped off to the search), minimizing the risk of harm to the officers (if he returned to the house to attack the police or disrupt the search), and aiding in the orderly conduct of the search (if he were brought back home and forced to assist).

Precisely the same law enforcement interests would be served if, instead of detaining the man on his way to the supermarket, the police detained him while he was shopping *at* the supermarket. Just as if he were detained a block or two from home, detaining him at the grocery store, shielded from view of the house to be searched, would minimize the risk that his detention might precipitate violence or the destruction of evidence by any person remaining at the house. At the supermarket, he would be equally likely (or unlikely) as when he was driving away from the house to learn of the search and leave town. He would be equally likely (or unlikely) to return home during the search and try to obstruct it or threaten officers' safety. And he would

be equally able (or unable) to assist in the search if he were forcibly returned.

This example begets countless others. The same rationale would justify the police in seizing the man in broad daylight in the public square, at a friend's home, in a classroom, or at his place of business—in front of members of his community, clients, coworkers, customers, or the boss.[2] A person can be alerted that his home is being searched and then flee, or go into hiding, wherever he is. He can "obstruct the search" (Opp. 11) from nearly anywhere, too—either by returning to the premises himself or by arranging some other disruption. Indeed, it is hard to imagine a scenario in which the court of appeals' capacious understanding of *Summers* would *not* authorize the detention of a person associated with a home being searched to prevent his flight, protect officer safety, or facilitate execution of the search. And the astonishing breadth of this detention authority is only heightened by the fact that the police would be permitted to "use reasonable force to effectuate the detention," including physical coercion. *Muehler* v. *Mena*, 544 U.S. 93 98-100 (2005).

The reasoning adopted by the court below and advanced by the government would thus entitle the police to conduct severely intrusive and embarrassing detentions without probable cause in circumstances far re-

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[2] In *United States* v. *Reinholz*, for example, the police detained the occupant of a home to be searched who was "at work and ... unaware of the warrant." 245 F.3d 765, 777-778 (8th Cir. 2001) (declining to apply *Summers*). Similarly, in *Whitaker* v. *Commonwealth*, the police detained a former occupant of a home to be searched who had already "reach[ed] his apparent destination"—namely, the driveway of someone else's home. 553 S.E.2d 539, 543-545 (Va. Ct. App. 2001) (declining to apply *Summers*).

moved from those of *Summers* or even from the facts of this case—in effect, converting a warrant describing a particular "place to be searched," U.S. Const. amend. IV, into a roving license to arrest any person thought to be associated with that place. This turns the probable cause requirement on its head. "The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion." *Dunaway*, 442 U.S. at 213.

II. REQUIRING THE DETENTION TO OCCUR "AS SOON AS PRACTICABLE" DOES NOT SUPPLY A SOUND OR WORKABLE LIMIT

In extending *Summers* to uphold the detention here, the court of appeals purported to require officers to "identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search." Pet. App. 15a. Presumably, the court viewed this rule as supplying an adequate limit on police detention authority that would prevent the broad range of intrusive seizures described above. In fact, the court's standard provides no such protection. The "as soon as practicable" approach is defective in substance because it has no principled basis and cannot be squared with *Summers* or the values underlying the Fourth Amendment. And it fails in practice because it provides virtually no guidance to law enforcement officials and poses substantial challenges to courts, which would find themselves engaged in difficult and fact-intensive line-drawing exercises to determine whether a particular detention was accomplished "as soon as practicable." In short, this purported limit cannot adequately deter or preclude the broad array of unreasonable seizures

that are otherwise permitted under the court of appeals' holding.

A. The "As Soon As Practicable" Rule Has No Basis In Logic, Precedent, Or Fourth Amendment Values

1. As an initial matter, the court of appeals' approach should be rejected because it has no principled basis. It is not supported by any of the justifications this Court relied on in *Summers*, and it fails to draw a sensible line between those detentions that should be permitted and those that should not. As shown above, for example, there is no distinction for purposes of the *Summers* justifications between someone who is detained "as soon as practicable" after leaving the premises to be searched and someone who is detained farther down the street or even miles away at the supermarket or his office. Whether or not a seizure takes place "as soon as practicable" after the occupant left the house, the same reasoning that the court of appeals relied on to uphold the seizure in this case would authorize any seizure that could be said to reduce the risk of a potentially dangerous confrontation or destruction of evidence or to enhance officers' ability "to detain [the occupant] if incriminating evidence [is] discovered." Pet. App. 14a-15a.

Indeed, upon closer inspection, the court's arbitrary standard in fact amounts to no limit at all. Requiring police first to "identify an individual *in the process of leaving* the premises subject to search" has the veneer of a meaningful and administrable limit (although, in practice, even that standard may be highly malleable, *infra* p. 15). But marrying that requirement to a rule that police must then detain the individual "as soon as practicable" erases any geographic or temporal

boundary. The point at which it is first "practicable" to detain an individual might arrive long after (or far away from) the point at which police saw the individual "in the process of leaving." Any clarity or force provided by the "process of leaving" requirement is thus undercut by the "as soon as practicable" limitation. *See, e.g.*, *United States* v. *Castro-Portillo*, 211 F. App'x 715, 721 (10th Cir. 2007) (recognizing that detaining an individual "as soon as practicable after [he] depart[s] the premises" will "'not necessarily[] result in detention ... in close proximity to his residence'" (quoting *United States* v. *Cochran*, 939 F.2d 337, 339 (6th Cir. 1991))).

2. The court of appeals' approach also fails to account for the intrusiveness of a detention that occurs in public, where it can be observed by others entirely unconnected to the event, rather than in the relative privacy of a home being searched. On the court of appeals' reasoning, so long as a seizure occurs "as soon as practicable" after the occupant leaves the premises, the seizure is permissible without regard to the degree of embarrassment or intrusion involved—which, as shown, can be substantial.

Exceptions to the probable cause requirement, however, have been permitted only where "the intrusion on the citizen's privacy 'was so much less severe' than that involved in a traditional arrest that 'the opposing interests in crime prevention and detection and in the police officer's safety' could support the seizure as reasonable." *Summers*, 452 U.S. at 697-698 (quoting *Dunaway*, 442 U.S. at 209); *see id.* at 699-700. Thus, in *Summers* itself, the Court emphasized that the detention at issue in the category of cases under consideration—requiring the occupant of a house simply to remain at home—was only incrementally more intrusive than the search of the house itself. *See* 452 U.S. at 701-702. Holding someone

at his residence, the Court explained, "could add only minimally to the public stigma associated with the search itself," *id.* at 702, and the detention would "not likely ... be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention," *id.* at 701.

In contrast, the "as soon as practicable" standard is blind to the degree of "public stigma" and would permit even the most intrusive or exploitive tactics. Whether it occurs four blocks from the premises or four miles, a detention effectuated in public, outside the privacy of the home, can subject the seized person to humiliation in front of his neighbors, coworkers, or other passers-by as police stop him, question him, and even handcuff him or use other reasonably necessary force to detain him. *See United States* v. *Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994) ("[B]ecause Sherrill had already exited the premises, the intrusiveness of the officers' stop and detention on the street was much greater."). Indeed, although the court of appeals dismissed it without explanation as "*de minimis*" (Pet. App. 13a), the intrusion here was substantial in itself and certainly far more intrusive than the search of the house.[3]

The degree of intrusion involved in any of the scenarios discussed above, *supra* pp. 6-8, would be even more extreme. A detention in the public street on the

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[3] Petitioner was detained and handcuffed outside his car approximately a mile from the premises being searched. And although Petitioner told police after they stopped him that he would not cooperate with their investigation (*see* Pet. Br. 5)—as was his right—the police exploited the detention by questioning and frisking him.

way to work would cause significant embarrassment; a detention after the person has arrived at the office would not only cause embarrassment, but also potentially disrupt his business or livelihood. Yet the "as soon as practicable" standard would permit such seizures without any regard for the degree of intrusion—even though that consideration is, or ought to be, central to any "reasonableness" inquiry. The court's rule thus fails to give effect to basic Fourth Amendment values.

3. Finally, the court of appeals' approach should be rejected because it incorporates a case-specific factual inquiry into the bright-line rule this Court adopted in *Summers*. Ordinarily, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," but "requires careful attention to the facts and circumstances of each particular case." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted). In *Summers*, the Court opted instead to "balanc[e] ... the competing interests" on a "categorical basis." 452 U.S. at 705 n.19; *see* 2 LaFave, *Search and Seizure* § 4.9(e), at 726 (4th ed. 2004). *Summers* thus affords law enforcement officials categorical authority to detain an occupant incident to a search that "does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" *Muehler*, 544 U.S. at 98 (quoting *Summers*, 452 U.S. at 705 n.19).

To the extent the Court viewed its "departure from the usual probable cause requirement" in *Summers* as "eliminat[ing]" "the risks of ad hoc decisionmaking," 2 LaFave, *Search and Seizure* § 4.9(e), at 726, the court of appeals' approach in this case would frustrate that purpose. Rather than turning simply on whether or not a detention occurred at the premises to be searched, the permissibility of a detention would depend on the

answers to such indeterminate questions as: "How soon is 'as soon as practicable'?" "For how long is a person 'in the process of leaving'?" Whatever the wisdom of the bright line drawn in *Summers*, it makes no sense to extend the bounds of that category in reliance on an "as soon as practicable" rule that defeats any benefits associated with the categorical approach.

B. The "As Soon As Practicable" Requirement Is Unworkable In Practice

Apart from these substantive defects, the "as soon as practicable" rule also fails as a practical matter because it does not adequately cabin police authority to detain without probable cause. As discussed, determining when a person may be subject to seizure based on probable cause ordinarily requires a case-specific inquiry. Where, as here, courts recognize a categorical exception to that requirement allowing detention in the absence of probable cause, such a departure from core Fourth Amendment principles can be tolerated, if at all, only where clearly defined rules leave minimal discretion to the police and are not easily subject to manipulation or abuse. The rule adopted by the court of appeals does precisely the opposite. It provides no clear guidance to police as to when they may detain an individual, but instead leaves them with unfettered discretion to make difficult, on-the-spot judgment calls as to when a detention on less than probable cause may "practicably" be effectuated, or whether they have missed the permissible window of opportunity to stop an occupant who has left the premises.

At the same time, by failing to delineate clearly the scope of police authority to detain without probable cause, the "as soon as practicable" standard invites manipulation by officers who perceive it as an entitlement

rather than a limit. *See, e.g.*, *Gant*, 556 U.S. at 347 ("Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement."); *id.* at 342 ("[L]ower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception." (internal quotation marks omitted)); *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment) (noting that decisions allowing the search of a car when "a motorist [is] handcuffed and secured in the back of a squad car ... are legion"). If granted authority to detain individuals without probable cause or prior judicial approval, police officers would likely perceive a significant advantage in pushing the boundaries of this authority. *See McDonald*, 335 U.S. at 456. The flexible terms of the court of appeals' standard would easily lend themselves to such manipulation, as police could easily explain why any of numerous contingencies—rush hour traffic, the presence of bystanders, or poor lighting—made it "impracticable" to detain an individual any sooner or in any less intrusive way.

Courts in turn would be naturally reluctant to second-guess these exercises of police discretion and would likely defer to police judgments about "practicability" and officer safety. *See, e.g.*, *United States* v. *Foster*, 376 F.3d 577, 587 (6th Cir. 2004) ("[I]t is inappropriate, in the quietude of our chambers, to second-guess standard police procedure and ... on-the-scene judgment." (internal quotation marks omitted)); *United States* v. *Blount*, 123 F.3d 831, 838 (5th Cir. 1997) ("If reasonable minds may differ the courts should not second-guess the judgment of experienced law enforcement officers concerning the risks of a particular situation." (internal quotation marks omitted)). Thus, one

court upheld a detention "ten to fifteen blocks from the residence," deferring to officers' judgment in the absence of evidence "suggest[ing] that the vehicle was not pulled over as soon as practicable." *United States* v. *Bullock*, 632 F.3d 1004, 1020 (7th Cir. 2011).

By the same token, those courts that do seek to enforce limits on police authority under the "as soon as practicable" standard will find themselves faced with difficult, if not impossible, line-drawing problems as they attempt to determine the point at which detention becomes impermissible. Have police identified an individual "in the process of leaving" if he has already pulled out of the driveway? What if he is a block away from his house but has not exited a gate surrounding his neighborhood? If police encounter the former occupant of a house subject to search on the highway on his way to the airport to leave town, is he not "in the process of leaving"? And what if it does not become "practicable" to detain him until well after he has completed "the process of leaving"?

Illustrating these difficulties, courts that have upheld detentions incident to execution of a search warrant away from the place being searched have struggled with the geographic reach of this extension of *Summers*, ultimately proving unwilling or unable to identify its boundary. *See, e.g.*, *United States* v. *Montieth*, 662 F.3d 660, 666 (4th Cir. 2011) ("We therefore decline to delineate a geographic boundary at which the *Summers* holding becomes inapplicable."); *United States* v. *Cavazos*, 288 F.3d 706, 711-712 (5th Cir. 2002) ("The [geographic] proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply *Summers*, but it is by no means controlling."); *Cochran*, 939 F.2d at 339 ("*Summers* does not impose upon police a duty based on

geographic proximity[.]"). Similar questions arise with respect to the rule's temporal boundary. Courts would have to grapple with whether "practicability" should be assessed solely in light of the time that has elapsed or whether other contextual factors should be considered, such as the reasonableness of waiting to detain an occupant at a secure location—*e.g.*, a neighborhood road versus a busy highway or a church parking lot versus a high-crime neighborhood. And courts may be asked to determine how long an occupant can be "in the process of leaving," and whether police actually saw the occupant depart during that time frame.

In light of this unworkability, the "as soon as practicable" standard cannot provide an enforceable boundary on the court of appeals' extension of *Summers*.

III. Extending *Summers* Is Not Necessary To Enable Police To Secure "Unquestioned Command" Of The Premises Or To Protect Legitimate Law Enforcement Interests

The extension of *Summers* adopted by the court of appeals is as unnecessary as it is unwise. The essential purpose of *Summers* was to permit officers to secure "unquestioned command" of the premises to be searched. 452 U.S. at 702-703. No extension of *Summers* is required to achieve that end. Courts have afforded police significant authority in executing a search warrant to "take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search." *Los Angeles County* v. *Rettele*, 550 U.S. 609, 614 (2007). Not least among those tools is the ability to restrain all occupants of the house for the duration of the search, using aggressive physical force if necessary. *Muehler*, 544 U.S. at 98-100.

The government offers no basis to believe that the daunting authority police already enjoy under *Summers* and other cases has proven insufficient to assert "unquestioned command" of any premises. Here, for example—as is commonly the case—a team of officers secured the premises using SWAT tactics and equipment, after surveilling the property from a staging area to assess the situation and plan their approach. Pet. Br. 3-4, 23-24.[4] Detaining someone at some other location merely because he previously occupied a house subject to search simply has nothing to do with the officers' "command" of the situation at that house. The government speculates (Opp. 11-12) that a former occupant of a house to be searched might learn the search was underway, arm himself, and return to the scene undetected to attack police. That hypothesis is far-fetched, to say the least, in light of the aggressive steps and surveillance tactics police routinely use to execute

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[4] Any suggestion that existing tools are insufficient to allow police to exercise "unquestioned command" of a place to be searched is belied by the facts of cases upholding police officers' seemingly limitless leeway to use aggressive tactics in executing a search warrant. *See Rettele*, 550 U.S. at 615-616 (finding no Fourth Amendment violation where police forced occupants to stand unclothed briefly during a search); *Muehler*, 544 U.S. at 95-96 (finding no Fourth Amendment violation where SWAT team members executing a search warrant ordered occupants of the home out of their beds at gunpoint and detained them in handcuffs for hours); *United States* v. *Allen*, 618 F.3d 404, 409-410 (3d Cir. 2010) (holding that SWAT team acted reasonably in executing search of a bar in a high-crime area by detaining bar patrons at gunpoint and ordering customers outside to lie face down on the ground); *Jama* v. *City of Seattle*, 446 F. App'x 865, 867 (9th Cir. 2011) (holding that SWAT team officers executing a search warrant acted reasonably in pointing guns at one occupant, handcuffing her, and forcing her onto the floor).

searches in potentially dangerous situations. *See also* NAFD Br. 8-14. In any event, the exceedingly remote possibility that a presumptively innocent person who is not subject to arrest would, if informed of the police presence, acquire weapons and return with confederates to attack the police is far too speculative to justify extended detention under the Fourth Amendment, which was adopted in large part out of "[h]ostility to seizures based on mere suspicion," *Dunaway*, 442 U.S. at 213; *see Henry*, 361 U.S. at 104.

The government's interest in seeking an extension of *Summers* is thus less about ensuring the safe and unfettered execution of a search warrant than about enabling the detention of suspects pending the discovery of probable cause. The court of appeals captured this concern when it reasoned that enforcing the limits of *Summers* as this Court has articulated them "would put police officers executing a warrant in an impossible position:

> [W]hen they observe a person of interest leaving a residence for which they have a search warrant, they would be required either to detain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him *if* incriminating evidence was discovered).

Pet. App. 14a (emphasis added). As Petitioner has explained, however, the choice described by the court of appeals poses a dilemma only if one forgets that "the appropriate focus is on the safest way to *execute the search warrant*," not on the "safest way to detain a recent occupant of a house." Pet. Br. 27. Police have no authority to detain a suspect merely because of his association with a house to be searched in the hope that

"[E]rratic driving or obvious attempts to evade officers can support a reasonable suspicion" justifying brief detention and questioning. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975). And police may stop someone upon a reasonable, articulable "suspicion that he may be connected with criminal activity" or upon information that he may be armed and dangerous to police officers or others. *Terry*, 392 U.S. at 10; *Adams* v. *Williams*, 407 U.S. 143, 146-147 (1972).

The exceptions to the probable cause requirement that this Court has already recognized thus provide several avenues by which law enforcement might detain an individual upon reasonable suspicion once he has left the premises of a house to be searched. And if execution of the search warrant does yield evidence of crime, police might then have the probable cause required for arrest. No boundless extension of *Summers* is necessary to achieve these legitimate law enforcement objectives. And there *is* no legitimate law enforcement interest in detaining a presumptively innocent person in anticipation of probable cause that does not yet exist.

probable cause will eventually materialize. However convenient it may be for police to detain a person of interest at the outset of a search in which they hope to find probable cause, the Fourth Amendment prohibits the government from detaining an individual in anticipation of probable cause that it has not yet obtained. Just as a warrantless search cannot be justified retroactively by the subsequent discovery of contraband, *e.g.*, *Florida* v. *J.L.*, 529 U.S. 266, 271 (2000), a seizure that is unsupported by probable cause at the outset is not permissible merely because police might later find evidence establishing that requisite foundation, *Henry*, 361 U.S. at 104; *Johnson* v. *United States*, 333 U.S. 10, 16-17 (1948).

Accordingly, if police do not wish to detain an occupant at the premises during a search for any reason, they can and must simply let him go—perhaps continuing to surveil him if they believe the fruits of the search might establish probable cause for an arrest, or if they truly fear he might flee or return to the scene to threaten officer safety.[5] If he does flee after leaving the premises, police might then have authority to stop and detain him briefly to investigate the reason for his flight. *See Illinois* v. *Wardlow*, 528 U.S. 119 (2000).

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[5] *See, e.g.*, *United States* v. *Dessesaure*, 429 F.3d 359, 361-362 (1st Cir. 2005) (police officers surveilled and followed suspect until the fruits of a search of the suspect's confederate at another location established probable cause for arrest); *United States* v. *Buggs*, 904 F.2d 1070, 1072 (7th Cir. 1990) (helicopter surveillance of suspect's car); *United States* v. *Weinrich*, 586 F.2d 481, 493 (5th Cir. 1978) (police vessels surreptitiously followed suspect's boats for several hours); *Castillo-Garcia* v. *United States*, 424 F.2d 482, 483-484 (9th Cir. 1970) (customs agents followed vehicle believed to contain large quantities of marijuana for several hours).

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

CHUNON L. BAILEY, AKA POLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN, TWENTY THREE (23) OTHER STATES, AND ONE (1) TERRITORY FOR RESPONDENT

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QUESTION PRESENTED

Whether, under *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981), the detention of an individual who has just left the premises to be searched under warrant is permissible when the individual is detained out of view of the house as soon as practicable.

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INTEREST OF *AMICI CURIAE*

The *amici* states employ and train thousands of police officers who protect citizens against illegal firearms and narcotics by apprehending those who possess such contraband. The Fourth Amendment right against unreasonable seizure imposes an important limitation on law enforcement's ability to investigate such crimes. Nevertheless, the *amici* states expect their officers to follow the law and accomplish their dangerous task in a manner that respects the civil rights even of those who have no regard for the law. The states therefore have a profound interest in providing officers with Fourth Amendment rules that are intuitive and workable.

Michigan v. *Summers* established such a rule, one that authorizes officers to detain the "occupants of the premises" while the officers execute a valid warrant to search for contraband. This case tests the limits of that authority. When officers overstep Fourth Amendment bounds, critical evidence may be excluded, thwarting the states' interest in protecting their citizens and bringing criminals to justice. But for *Summers*' categorical rule to remain workable, its limits must be discernible, logical, and consistent with the Fourth Amendment's principle of "reasonableness." Petitioner's proposed rule thwarts all three of these goals and would be easily exploited to avoid prosecution. The *amici* states instead seek a decision from the Court that upholds *Summers*' core tenet: that an occupant's connection to a residence believed to contain contraband justifies detention during a search warrant's execution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment's central inquiry is reasonableness. When a neutral magistrate has found probable cause to search a residence for contraband, officers have probable cause to believe someone in the residence has committed a crime. This in turn gives officers reason to suspect any occupant of the residence of criminal activity. Because the government has a substantial interest in apprehending wrongdoers, not to mention minimizing safety risks and facilitating orderly completion of the search, it is reasonable for officers to detain occupants until the search is complete.

The Second Circuit and numerous other circuits have recognized correctly that an officer's "individualized suspicion" of occupants and the government's interest in detaining them do not dissipate when an occupant leaves the premises. To the contrary, when officers see an occupant leave a residence, the occupant's "connection" to the residence is just as apparent as it would be if the occupant had stayed on site. In *Summers*, the occupant was detained on the sidewalk in front of the residence, and this Court held that it was reasonable for officers to require the occupant to re-enter and remain in the residence.

The officers here could have detained Bailey before he left his residence's premises. But the officers reasonably believed that doing so would jeopardize safety and the integrity of the search. So they allowed Bailey to travel one mile in his vehicle, onto a less busy street, before detaining him.

Bailey's brief sojourn did not diminish the government's interest in detaining him: he was still individually suspected of a crime, could still help in the orderly completion of the search, and still posed a potential threat of harm to officers. Officers have been killed by occupants who return to their residence and discover a search in progress. Nor does the routine traffic stop or the ride back to the residence in a squad car make the detention so much more intrusive that the method of detention becomes unreasonable under *Summers*. The government's substantial interests still justify detention.

Petitioner's attempt to limit *Summers* to a premises' "immediate vicinity" is not workable. *Summers*' scope cannot be defined by drawing such an arbitrary line, because *Summers* has very little to do with the geographic location of the occupant when detained. *Summers* turns on the fact that the occupant is connected to a residence that officers have probable cause to believe holds contraband. Because that connection and the government's interest in detention remain after the occupant leaves the premises, it was proper for the Second Circuit to apply *Summers* here.

ARGUMENT

I. The Second Circuit applied *Summers*' categorical rule well within the bounds of its original justifications.

In *Michigan* v. *Summers*, this Court established a categorical rule: officers do not infringe the Fourth Amendment when they detain the "occupants of the premises" during the execution of a search warrant for

contraband. When a neutral magistrate has found probable cause to believe contraband exists in the home, "[t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Summers*, 452 U.S. at 703–04.

The incremental nature of the additional intrusion on personal security, and the strong government interests in apprehending wrongdoers and in the safety and efficacy of the search, make such detentions reasonable. *Id.* at 701–04. Because these justifications do not immediately dissipate when that occupant leaves the premises just before the search, the Second Circuit correctly applied *Summers* here.

A. Under *Michigan* v. *Summers*, probable cause to search a residence for contraband includes authority to detain the "occupants" because of their connection to that residence.

1. The Fourth Amendment inquiry

The "central inquiry" under the Fourth Amendment is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry* v. *State of Ohio*, 392 U.S. 1, 19 (1968). In *Terry*, this Court "recognized the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause." *Summers*, 452 U.S. at 698. The Court held that officers have a limited authority to "stop"

individuals suspected of criminal activity for the purpose of investigation. *Terry*, 392 U.S. at 32–33. To establish such individualized suspicion, officers must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. A brief detention of that individual is then authorized to serve the government's interests in crime detection and prevention. *Id.* at 21–30. As this Court later explained, "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams* v. *Williams*, 407 U.S. 143, 145 (1972).

Terry set forth an analytical framework for evaluating "reasonableness" that this Court applies in cases involving temporary seizures. See, e.g., *Adams*, 407 U.S. at 145 (applying *Terry* to hold that a brief stop of an individual suspected of carrying narcotics and a deadly weapon was reasonable "to maintain the status quo while obtaining more information"). At its most basic level, the reasonableness "inquiry is a dual one—[1] whether the officer's action was justified at its inception, and [2] whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19–20. The seizure of a person is justified "at its inception" when (a) individualized suspicion exists, and (b) the government's interest in detention justifies the invasion personal security. *Id.* at 21. Answering the latter question essentially involves a "balancing of competing interests." *Dunaway* v. *New York*, 442 U.S. 200, 219 (1979) (White, J., concurring).

2. The *Michigan* v. *Summers* analysis

In *Summers*, police officers executing a search warrant detained and returned to the residence an occupant who had left the building and had made it as far as the property's sidewalk. This Court held that it was "constitutionally reasonable" for officers to detain the occupant while officers executed a valid warrant to search the residence for contraband.

Looking first to the balance of competing interests, this Court observed that additional intrusion on personal security is marginal when a neutral magistrate has already authorized a substantial invasion of that occupant's privacy. *Summers*, 452 U.S. at 701. Most citizens would prefer to stay and observe the search anyway, unless they would flee to avoid arrest. *Id.* Moreover, such detentions are unlikely to be exploited or unduly prolonged because the targeted information would normally be found through the search. *Id.* Nor would the detentions invite the public stigma, inconvenience, and indignity associated with a compelled trip to the police station. *Id.* at 702.

At the same time, when a search involves contraband, "substantial" law enforcement interests warrant the occupant's detention. The existence of contraband means that someone in the residence has committed a crime. *Id.* at 704. It also raises the possibility of "sudden violence or frantic efforts to conceal or destroy evidence." *Id.* at 702. On a different note, the occupants' presence may facilitate the search if they are motivated by self-interest to open locked doors or containers. *Id.* at 703. Thus, the Court identified three government interests supporting detention: (1) preventing flight of the occupant in the

event that incriminating evidence is found, (2) minimizing risk of officer harm, and (3) facilitating the search's orderly completion. *Id.* at 702–03.

Satisfied that the balance of competing interests favored detention, the Court turned to the second *Terry* prong: the "nature of the articulable and individualized suspicion on which the police base the detention." *Summers*, 452 U.S. at 703. Again, when a neutral magistrate has found probable cause to believe contraband is in the residence, police have "probable cause to believe that someone in the home is committing a crime." *Id.* "The connection of an occupant to that home [then] gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Id.* 703–04.

Having found the intrusion minimal, the government interests substantial, and the individualized suspicion "easily identifiable," this Court held that a warrant to search for contraband "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 702–05. That is to say the authority is "categorical," *Muehler* v. *Mena*, 544 U.S. 93, 98 (2005), such that officers are not required to "evaluate the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure," *Summers*, 452 U.S. at 705 n.19. As Justice White explained in *Dunaway*, "if police are to have workable rules, the balancing of the competing interests inherent in the *Terry* principle 'must in large part be done on a categorical basis—not in an *ad hoc*, case-by-case fashion by individual police officers.'"

Summers, 452 U.S. at 705 n.19 (quoting *Dunaway*, 442 U.S. at 213 (White, J., concurring)).

Though the authority to detain occupants requires no balancing under *Summers*, the same is not true of the time and manner in which the occupant is detained. This Court stated in *Summers* that:

> Although special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case.

Summers, 452 U.S. at 705 n.21. Thus, the "scope" of the detention must be reasonable.

The Court confirmed this understanding in *Muehler* when it considered the reasonableness of detaining an occupant in handcuffs during a 2- to 3-hour search of her home. *Id.* at 99–101; see also *Los Angeles County, California* v. *Rettele*, 550 U.S. 609, 615 (2007) (evaluating the length of the detention and the reasonableness of the manner in which it was conducted). Courts retain latitude to check for abuses of the limited but categorical authority *Summers* affords.

B. The justifications for the *Summers* rule fully support detention of occupants after they leave the "immediate vicinity" of the premises.

The narrow issue in this case is whether the execution of a valid search warrant for contraband still justifies the detention of occupants who leave what Petitioner calls the "immediate vicinity" of the premises just before execution. In other words, comparing this case to *Summers*, does it make a constitutional difference when an occupant takes a step beyond the premises' sidewalk?

The "key principle," as always, is "reasonableness." *Dunaway*, 442 U.S. 200 at 219 (White, J., concurring). If the existence of a valid search warrant for contraband means there is individualized suspicion, and the competing interests categorically favor detention, then detaining occupants who leave the premises shortly before execution of the warrant is constitutionally sound under *Summers*.

1. A search warrant for contraband means reasonable suspicion that an occupant has committed a crime.

When a neutral magistrate has determined there is probable cause to believe contraband is in the residence, officers have probable cause to believe someone in the residence has committed a crime. *Summers*, 452 U.S. at 704. The fact that a person is an occupant is "alone" sufficient to create the individualized suspicion required to justify detention. *Muehler*, 544 U.S. at 99 n.2. Seeing an occupant exit a

residence just before execution of the search establishes the same connection to that residence, and therefore the same degree of individualized suspicion, that would have existed if the occupant had never left.

In other words, individualized suspicion does not dissipate just because the occupant has stepped outside of this ill-defined zone Petitioner has dubbed the "immediate vicinity." Indeed, Petitioner and his supporting *amici curiae* have never addressed how it possibly could.

2. The government has a continuing interest in detaining an occupant leaving a residence subject to search warrant.

The question is whether applying *Summers* to the narrow category of cases represented here still results in detentions that are reasonable. That is, do the competing interests balance in a way that favors detention? If the justifications for the rule in *Summers* dissipate when the occupants leaves the "immediate vicinity" as Petitioner suggests, then the inquiry is over, because the interests in personal security outweigh non-existent government interests.

But that is not the case. The same government interests in preventing flight, minimizing officer safety risks, and facilitating the orderly completion of the search, justify requiring an occupant to return to his residence if the occupant was seen leaving just before the search was executed. That conclusion is particularly true where, as here, officers could have detained Petitioner at his premises but elected not to do so for safety and other interests.

a. Preventing flight

When an occupant leaves the premises, the government still has a substantial interest in preventing flight. The Model Code of Pre-Arraignment Procedure's comment on this issue is especially insightful:

> [I]n such circumstances, where a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to 'freeze' the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken. To deny the police such a power would be to pay a high price in effective policing and in the police's respect for the good sense of the rules that govern them.

Model Code of Pre-Arraignment Procedure 270–72 (1975), *quoted in* 3 Wayne R. LaFave, Search & Seizure § 9.2, n.18 (4th ed. 1978). In specific, a search may reveal in a matter of minutes the evidence that justifies an arrest. The public has a compelling interest in keeping the occupant at least long enough to make that determination.

The interest in preventing flight cannot depend on whether officers have evidence that the occupant was alerted to their presence in a given situation. The risk of flight is averted only if law-enforcement officers are allowed to detain the occupant from the outset of a search warrant's execution. Petitioner's naïve view–that officers should just wait until the occupant returns if stopping his departure would jeopardize the search–

does not account for the additional flight *and* safety risk this creates. If the occupant returns unexpectedly in his vehicle to find officers entering or posted at the entrance of the residence, he will have more incentive to flee and put officers and others' safety at greater risk in a chase, than if officers detain him when he may be unaware of the search.

Petitioner's argument that there must be some indication the occupant knows of the impending search (Pet. Br. 10) is nearly identical to the "contact initiation" rule this Court rejected in *Thornton* v. *United States*, 541 U.S. 615, 621, 623 (2004). That case involved the application of *New York* v. *Belton*, 453 U.S. 454, 460 (1981), which established the rule that officers may search the passenger compartment of a vehicle incident to the lawful arrest of its occupant. The petitioner in *Thornton* argued that when officers initiate contact after the occupant has left the vehicle, the rule in *Belton* should not apply. *Thornton*, 541 U.S. 615 at 621–22. This Court rejected that proposition because it would obfuscate *Belton's* constitutional limits:

> An officer approaching a suspect who has just alighted from his vehicle would have to determine whether he actually confronted or signaled confrontation with the suspect while he remained in the car, or whether the suspect exited his vehicle unaware of, and for reasons unrelated to the officer's presence. This determination would be inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of the officers in the field and

> reviewing courts that *Belton* sought to avoid. Experience has shown that such a rule is impracticable, and we refuse to adopt it.

Thornton, 541 U.S. 615 at 623.

Petitioner's argument that the detention's validity turns on whether the occupant was alerted to the search is no different in kind. It would require officers to make the same sort of "inherently subjective and highly fact specific" determination that this Court said was "impracticable" in *Belton*.[1]

Importantly, the government's interest in apprehending the suspect is broader than just preventing flight. Among other things, the police have a need for time sufficient to determine if there is probable cause for an arrest. See *United States* v. *Hensley*, 469 U.S. 221, 229 (1985) (holding it reasonable to stop a suspect while officers wait for more information to confirm whether there is probable cause for arrest). As one commentator put it, "[t]he suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people." 3 W. LaFave, Search and Seizure § 9.2, pp. 36–37 (quoted in *Summers*, 452 U.S. at 700 n.12). Thus, there is a strong

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[1] Equally inapposite is Petitioner's reliance on *Arizona* v. *Gant*, 556 U.S. 332 (2009). (Pet. Br. 21–22.) In *Gant*, the facts of the case took it outside the justifications for the search-incident-to-arrest exception as defined in *Chimel* v. *California*, 395 U.S. 752, 763 (1969), and applied to vehicle searches in *Belton*. Here, the facts fit the justifications for the *Summers* rule.

government interest in stopping the suspect, even if there is no *present* flight risk.

b. Officer safety

Officers also have a strong interest in detaining a departing occupant to minimize risk of harm to the officers and others. There are times when an individual who arrives at his residence during the execution of a search shoots and kills an officer conducting the search. *Federal Bureau of Investigation, Law Enforcement Officers Killed and Assaulted 2008, Summaries of Officers feloniously Killed*, FBI.gov, available at http://tinyurl.com/LEOKA2008 (describing a September 28, 2008 incident in Illinois). It is not at all far-fetched to postulate that a returning occupant may "try to forcibly thwart execution of the warrant." *United States* v. *Ritchie*, 35 F.3d 1477, 1484 (10th Cir. 1994); see also *United States* v. *Castro-Portillo*, 211 Fed. App'x 715, 721 (10th Cir. 2007) ("the fact that [Mr. Castro-Portillo] did not know about the search warrant does not diminish the risk he may have posed."). Searches of the sort contemplated here, for contraband such as firearms and narcotics, are "the kind of transaction that may give rise to sudden violence." *Summers*, 452 U.S. at 702; *United States* v. *Henderson*, 364 F.2d 627, 629 (8th Cir. 1981) (officers stopped the defendant after he drove away from the residence "to avoid violence.").

There are additional safety concerns in executing the warrant without the occupant's cooperation. Forcible entry can pose a danger to other occupants. *United States* v. *Montieth*, 662 F.3d 660, 667 (4th Cir. 2011) ("By securing Montieth's cooperation in the

search, the officers hoped to avert any unnecessary danger to Montieth's family and to assure the officer's safety"). The occupant may have even set traps that could cause injury or destruction of property. *United States* v. *Briley*, 319 F.3d 360, 362 (8th Cir. 2003) (stopping the defendant out of concern for the "safety of the officers executing the warrant: Briley had told the informant that the mobile home was 'rigged to explode' and that if the police had tried to arrest him he could detonate the mobile home upon the push of a button."). The home may contain a dangerous animal. *United States* v. *Head*, 216 Fed. App'x 543, 544 (6th Cir. 2007) (returning the defendant to his residence where he was allowed to secure his pit bulls). Detaining the occupant to secure his presence and cooperation is essential to minimizing the risks of harm.

Under this Court's precedents, officers can take precautionary measures designed to ensure their safety, even "without reasonable suspicion that the [individual] poses a safety risk." *Maryland* v. *Wilson*, 519 U.S. 408, 414 (1997) (concluding that "during a lawful traffic stop an officer may [always] order a passenger out of the car as a precautionary measure"). This is why officers are allowed to search a person incident to a lawful arrest, regardless of whether they suspect the person is armed or holding evidence. *United States* v. *Robinson*, 414 U.S. 218 (1973).

If officers are forced to proceed without detaining the occupant until the threat of harm from the departed occupant presents itself, lives could be lost. Even if the odds are small that injury or death will result from letting an occupant leave during a search, the Fourth Amendment does not require officers to

take such a high-stakes gamble. That is precisely the calculus in which the officers engaged here.

c. Completing the search

Finally, when an occupant leaves the premises, the government's interest in detaining that occupant to seek cooperation also remains. It is no argument that the occupant lacks an obligation to cooperate, because it is often the case that an occupant will opt to cooperate with officers voluntarily, regardless of obligation. See, e.g., *Head*, 216 Fed. App'x at 544 (returning the defendant to his residence where he was allowed to secure his pit bulls); *Montieth*, 662 F.3d at 663 ("[O]fficers preferred to execute the warrant with [the defendant's] cooperation to avoid abrupt or forcible entry into the house while his wife and children were inside. Montieth opted to cooperate with the warrant's execution . . . ."); *United States* v. *Sears*, 139 Fed. App'x 162, 164 (11th Cir. 2005) (when officers approached and informed the defendant that they "could perform a 'hard' entry by breaching the door or a 'soft' entry if Sears would give them a key," the defendant handed officers a key for entry to the house). Officers still have an interest in requesting that cooperation.

Moreover, given the individualized suspicion that arises by virtue of the search warrant, officers are justified in conducting a brief stop for other purposes, including not only to request the occupant's identification, see *Adams*, 407 U.S. at 146, but more important, to inform him of the impending search and request his cooperation, e.g., *Ritchie*, 35 F.3d at 1481 ("While the agents did block his exit from the driveway, they did so to inform him that a warrant to search his

house was on the way and to ask him if he would stay while the search was conducted"); *Sears*, 139 Fed. App'x at 164 (after stopping Sears as he pulled out of his driveway, police "approached the car and told Sears that the police were getting ready to execute a search warrant for narcotics at Sears' house"); *Briley*, 319 F.3d at 362–63 ("Deputy Jones testified that he also wanted to inform Briley of the impending search and to request that he be present when the officers executed the warrant."); *Henderson*, 364 F.2d at 629 (officers stopped the defendant after he drove away from the residence "to inform [the defendant] of the existence of the search warrants"); see *Summers*, 452 U.S. at 703 (recognizing the government's interest in facilitating an orderly search).[2] Of course, orderly completion of the search itself justifies returning the occupant to the residence. *Id.* But in addition, officers have a strong interest in seeking cooperation.

C. Detaining the occupant in a traffic stop away from home is not so intrusive that it exceeds the bounds of presumptive reasonableness under *Summers*.

Having established that the government's interests are not eliminated when an occupant departs a residence subject to a search for contraband, the only remaining issue is whether the detention becomes so intrusive in this narrow category of cases that it is unreasonable to apply *Summers*. This question really

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[2] The search was completed before Bailey returned only because the guns and drugs were in plain view. *United States* v. *Bailey*, 652 F.3d 197, 201 (2d Cir. 2011). In other cases, the contraband may be more difficult to find. E.g., *Muehler* v. *Mena*, 544 U.S. 93, 100 (2005) (involving a 2- to 3-hour search of the home).

goes to the "scope" of the detention, not its "inception." The key issue is whether the sort of stop executed by police here is a "routine detention" for purposes of *Summers*. See 452 U.S. at 705 n.21. The states respectfully suggest it is.

1. Similarities between this case and *Summers*

Focusing first on the similarities, the factor of "prime importance" that made detentions in the home reasonable under *Summers* was "the fact that the police had obtained a warrant to search respondent's house for contraband." *Id.* at 701. As the Court observed, "we may safely assume that most citizens—unless they intend flight to avoid arrest—would elect to remain in order to observe the search of their possessions." *Id.* That "prime" factor is also present here. And it is equally safe to assume that an occupant who has left the premises would elect to return, unless—again—he intends to flee. In that sense, the detention here is similar to that in *Summers*.

Also relevant in *Summers* was whether detention was of the sort that it would be "exploited by the officer or unduly prolonged in order to gain more information." *Summers*, 452 U.S. at 701. The Court found little risk of that in *Summers* because "the information the officers seek normally will be obtained through the search and not through the detention." *Id.*

The situation is no different here. The officers sought a gun, and they found a gun, along with narcotics, in the course of the search, giving them cause to arrest Bailey. *United States* v. *Bailey*, 652

F.3d 197, 200 (2d Cir. 2011). Because finding such contraband in the home was the principal mission, the officers who detained Bailey had no more incentive for exploitative questioning than the officers who detained Summers. See, e.g., *Muehler*, 544 U.S. at 100–01 (holding that questioning the occupant about her immigration status during the detention was not a violation of her Fourth Amendment rights). The point of *Summers* was not that the detention left no opportunity, but that it created no *incentive* for exploitative questioning. The contrast is *Dunaway*, where there was no search warrant, and the detention involved bringing the defendant down to the station house for interrogation. *Summers*, 452 U.S. at 702. That is not the sort of detention at issue here.

2. Differences between this case and *Summers*.

There are two relevant—but ultimately insignificant—differences between the detention in this case and the detention in *Summers*. One, the detention in this case involved a traffic stop and transportation back to the residence in a squad car, rather than a stop on the residence's sidewalk. Two, the detention here involved handcuffing. Petitioner contends that these differences make such detentions categorically more dangerous, more stigmatizing, and more susceptible to exploitative questioning. To the contrary, these distinctions add very little to the intrusiveness of the already-authorized search pursuant to a warrant.

It is impossible to say categorically, one way or the other, that a stop on the sidewalk in front of a residence is less dangerous than a traffic stop one mile

away. Certainly the detention is more dangerous on the road if the occupant tries to flee, but that also means the attempted stop was all the more justified. Ultimately, every detention is going to involve some danger when the search warrant is for contraband, and law enforcement must be allowed to exercise discretion, based on the evolving circumstances, as to how the stop should be executed to promote safety and achieve the ultimate objective.

Here, the officers could have detained Petitioner before he left his residence's premises. But the officers reasonably believed that doing so would jeopardize safety and the integrity of the search. Allowing Petitioner to travel a short distance before stopping him does not change the constitutional balancing.

It also cannot be said that traffic stops, or transportation in a squad car, as a categorical matter, add significantly more to the pre-existing public stigma of the authorized search than the detention did in *Summers*. The fact that it was in public view makes no difference. Summers, after all, was not detained inside his residence either. He was detained on the sidewalk in front of his residence, presumably in full public view of his neighbors. *Summers*, 452 U.S. at 702 n.15. This Court rejected the notion that this fact made Summers' detention more intrusive: "[t]he seizure of respondent on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside." *Id.* If anything, it would normally be more intrusive, and more humiliating, to be stopped by police in front of one's own home in plain view of one's neighbors than a mile away, where one is less likely to be known by passers-by.

Finally, as explained above, the traffic stop and car ride do not create more opportunity for exploitative questioning than in other types of detentions covered by *Summers*. The detention at issue here arises out of the execution of a search warrant, and that search is ultimately the focus of the investigation, not the occupant himself. The suggestion that Bailey's questioning here was exploitative cannot be seriously entertained given this Court's decision in *Muehler*. There, the officers called in an agent of the Immigration and Naturalization Service who questioned the occupants regarding their immigration status while they sat in handcuffs for two hours in a converted garage outside the home. *Muehler*, 544 U.S. at 96, 100. This Court held there was no Fourth Amendment violation in such circumstances, *id.* at 101; in comparison, simply asking for Bailey's name, home address, and driver's license can hardly be considered exploitive here. *Bailey*, 652 F.3d at 201.

The Second Circuit tried to avoid mischief by adopting a principle that officers must detain the occupant "as soon as reasonably practicable." *Bailey*, 652 F.3d at 208. It is easy enough to look for evidence that the officers were manipulating the circumstances to abuse their authority. See, e.g., *Castro-Portillo*, 211 Fed. App'x at 722 ("[T]he facts of this case do not suggest, as Mr. Castro-Portillo implies, that authorities in any way attempted to manipulate the circumstances in order to detain him street-side."); cf., e.g., *United States* v. *Cochran*, 939 F.2d 337, 339 (6th Cir. 1991) ("[T]he facts and evidence do not suggest that the police attempted to manipulate the circumstances in order to search defendant's car."). Suffice it to say, this Court need not consider the various "special

circumstances" that might take this case outside the bounds of *Summers*. The detention at issue here was nothing but routine.

II. Petitioner's proposal of limiting *Summers* to the "immediate vicinity" of the residence is illogical and unworkable.

Petitioner proposes limiting *Summers* to the "immediate vicinity" of the premises, but this is a poor limiting principle for several reasons. For one, the concept calls for arbitrary line drawing. Is the immediate vicinity 10 feet from the residence? 20 feet? Within the "curtilage" of the residence? Is it anywhere in the residence's line of sight? What if a tree is blocking the view? Are real property lines relevant? If the point is just to draw a line somewhere, any of these boundary markers would accomplish that purpose, but the chosen limit would be purely arbitrary.

A proper limiting principle should be a common-sense rule, easily applied by officers in the field. Take, for instance, a search incident to arrest, where the right to search is limited to the arrestee's area of "immediate control." See *Chimel* v. *California*, 395 U.S. 752, 763 (1969). The concept of "immediate control" makes sense as a limiting principle for *Chimel* because *Chimel* is concerned with where the officer may search. And because the objective of the search is to prevent that from happening, officers readily and easily identify the area of "immediate control" as any place "within which he might gain possession of a weapon or destructible evidence". *Id.*

Petitioner's "immediate vicinity" rule is nothing like the "immediate control" rule in *Chimel*, as it provides no common-sense principle by which an officer can identify the "immediate vicinity." The reason for this is simple: the concept bears no direct relationship to the government's interests that justify the detention under *Summers*. The interest in detaining an occupant does not flow from the occupant's geographic proximity to the residence, but from his apparent association with the residence at the time of the search. Accordingly, the government's interest in detaining that occupant does not immediately dissipate when the occupant steps beyond the sidewalk or some other, arbitrary geographic boundary. And, conversely, the government has no interest in detaining a person who inadvertently walks into the "immediate vicinity" of the residence.

Without an easy way to identify the boundaries, officers would be left to arbitrary line drawing that could later be easily displaced by a judge's or jury's own subjective notion of where the "immediate vicinity" should be. Petitioner's standard is therefore highly susceptible to *post hoc* litigation, far more so than the Second Circuit's principle that officers should stop the occupant "as soon as practicable."

Perhaps most important, Petitioner's standard imposes the dilemma the Second Circuit sought to avoid. *Bailey*, 652 F.3d at 205–06. If officers confront an occupant on his lawn, the officers risk alerting occupants in the residence to their presence, giving them time to destroy evidence that would inculpate the occupant. If the officers do not confront the person, they must let him go, only to confirm their suspicion

during the search that the occupant who has now gone his merry way was involved in criminal activity. Placing officers in this bind runs contrary to the Fourth Amendment's key principle of reasonableness.

No limiting principle needs to be developed here because several are already present in *Summers*. First, the timing of the detention is limited by the duration of the search. Any detention that occurs after the search is over is outside the bounds of *Summers*, as *Summers* only applies to detentions "while a proper search is conducted." *Summers*, 452 U.S. at 705.

Second, detention of an occupant who was not seen leaving the premises just before the search was executed does not fall squarely under *Summers* either. The individualized suspicion that supports detention in *Summers* depends on a connection of the occupant to the residence that is apparent from the fact that the occupant is in the residence during or just before the search is executed. *Summers*, 452 U.S. at 703–04. That is not to say such a connection could not be drawn from other sources, but such a case is not presently before the Court, and the Court's decision here can easily be limited to the narrow category of cases that these facts present.

Third, and finally, the scope of the detention is limited by whether the detention is "routine" or whether "special circumstances" make the detention especially intrusive. *Id.* at 705 n.21.

If this Court believes some additional limiting principle is necessary, the Second Circuit's principle that the occupant be detained "as soon as reasonably practicable" is far better than Petitioner's "immediate

vicinity" rule. The Second Circuit properly places the focus on police conduct rather than an arbitrary geographic line. Many of the circuits that have considered the "as soon as reasonably practicable" standard have adopted it. *Cochran*, 939 F.2d at 339 ("*Summers* does not impose upon police a duty based on geographic proximity; rather, the focus is on police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence."); *United States* v. *Cavazos*, 288 F.3d 706, 712 (5th Cir. 2002) (following *Cochran*); *Castro-Portillo*, 211 Fed. App'x at 721 (same); *Head*, 216 Fed. App'x at 546 (same); *Montieth*, 662 F.3d at 666–67 (same). And the Second Circuit's standard is consistent with this Court's statement in *Hensley*, that "[a] brief stop and detention at the earliest opportunity after the suspicion arose is fully consistent with the principles of the Fourth Amendment." 469 U.S. at 234.

Either way, the Court should conclude that, because the officers were in the process of executing a search warrant for contraband when Bailey left the premises, the Second Circuit properly applied *Summers* to determine that Bailey's detention in a routine traffic stop did not violate his Fourth Amendment rights.

* * * * *

Like George Summers, Bailey occupied a residence that a neutral magistrate found probable cause to search for contraband. Like Summers, officers detained Bailey no longer than necessary to complete the search, which produced a gun giving them probable cause for arrest. Applying *Summers* in cases such as this—where officers see the occupant leave just before the search—

does not give officers carte blanche to seize occupants outside the premises under "any circumstances." It merely establishes that seizure of departing occupants at its "inception" is reasonable and not a violation of the Fourth Amendment absent "special circumstances" related to the manner of detention. Officers here conducted a normal traffic stop, asked Bailey to exit the vehicle, handcuffed him, and returned him to his residence, just like the officers in *Summers*. There is nothing special about the circumstances that warrant sacrificing the government's interests. This procedure was routine and should be deemed presumptively reasonable under *Summers*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEF

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IN THE

Supreme Court of the United States

CHUNON L. BAILEY,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of petitioner in *Bailey v. United States*, No. 11-770.[1]

NACDL is a nonprofit organization with a direct national membership of approximately 10,000 members and up to 40,000 with affiliate members from across the nation. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. A letter reflecting the consent of the respondent is attached to the certificate of service; petitioner has filed a blanket consent to the filing of amicus briefs.

INTRODUCTION AND SUMMARY

Categorical rules are the exception in the Fourth Amendment context. The Constitution usually requires an individualized determination that the particular person whose liberty will be limited has done something to warrant that intrusion. While this Court has adopted categorical rules in a few limited situations, the Court has recognized that these rules—which allow intrusions on individual liberty that are neither approved by an impartial magistrate nor supported by an individualized finding of reasonableness—must be narrowly tethered to the justifications that underlie them.

But as this Court's precedents show, the few categorical rules permitted in the Fourth Amendment context have the tendency to expand over time. The rule announced in *Michigan v. Summers*, 452 U.S. 692 (1981), is no exception. In *Summers*, this Court held that police officers are, as a categorical rule, entitled to detain the occupants of a home during the execution of a warrant, in order to protect the officers and to facilitate an orderly search. *Id.* at 705. Over time, though, the rule has been stretched to cover situations in which detention serves no legitimate law enforcement interest other than police convenience—an unjustifiable expansion that comes at the expense of the Fourth Amendment.

While this would be of concern in any context, it is of particular concern here. Of all the categorical rules, *Summers* is the only one that allows the seizure and prolonged detention of an individual, for ordinary law enforcement purposes, without any degree of individualized suspicion. The rule is unique, intrusive, and overly broad; as construed by the

court below it allows seizures that are neither reasonable nor linked to the underlying concern of police safety. As this Court has done with other categorical rules stretched and distorted over time, the Court should strictly limit *Summers* to the narrow scope supported by the Constitution.

I. CATEGORICAL RULES ARE THE EXCEPTION IN THE FOURTH AMENDMENT CONTEXT

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. This Amendment "reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). For this reason, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967); *Mincey*, 437 U.S. at 390 (same).

Most of the exceptions to the warrant requirement themselves require individualized assessments of the reasonable of the intrusion; the classic example is *Terry v. Ohio*, 392 U.S. 1 (1968), where the Court recognized "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 27. In recognizing situations where the Fourth Amendment does not require a showing of probable cause, however, the Court still

insisted on an *individualized* determination that the "specific and articulable facts" of the situation, "taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *see also, e.g.*, *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979) (suspicion must be specifically directed at the person being detained).

In a few limited situations, the Court has considered categorical rules allowing intrusions that are neither sanctioned by an impartial magistrate nor supported by an individualized finding of reasonableness. The Court has at times expressed ambivalence about the propriety of these categorical determinations, "eschew[ing] bright-line rules" and "instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quotation marks omitted). This reluctance to embrace categorical rules is well justified, for the "distinguishing feature of our criminal justice system is its insistence on principled, accountable decisionmaking in individual cases. If a person is to be seized, a satisfactory explanation for the invasive action ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case." *Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting).

At other times, though, the Court has approved certain categorical rules in order to provide consistency and guidance for police officers on the street. *See Wilson*, 519 U.S. at 413 n.1 (fact that "we typically avoid per se rules concerning searches and seizures does not mean that we have always done so"); *Dunaway v. New York*, 442 U.S. 200, 219-20 (1979) (White, J., concurring).

These categorical rules can be roughly classed in four groups, and their contours and limitations are briefly set out below. Of all these rules, it is only *Summers* that unequivocally permits the government to seize and detain an individual, solely for ordinary law enforcement purposes, without any degree of individualized suspicion.

A. Detention Incident To Search

In *Summers*, this Court considered whether police searching for contraband under a valid warrant could detain an occupant of the premises for the duration of the search. Stressing the need for police to be able to assert unquestioned command over the situation—since in some cases they may need to enter and take control over a building without full knowledge of what may await—the Court concluded that the law enforcement interests in detention outweighed the individual liberty interests, particularly since the detention during the search would be "'substantially less intrusive' than an arrest." *Summers*, 452 U.S. at 702-03 (citations omitted).

When the *Summers* rule applies, police need not make an individualized determination of the reasonableness of the detention. *Muehler v. Mena*, 544 U.S. 93, 98 (2005). Rather, police searching for contraband under a valid warrant may seize *all* occupants of the premises for the duration of the search, even absent any individualized reason to think any of them poses a danger to the police. *Id.* at 98. Because of this categorical approach, *Summers* is often applied to permit more significant curtailments on personal liberty than would be authorized under the more typical Fourth Amendment inquiry tailored to individualized circumstances. This case is a prime

example, as the officer's actions in detaining, handcuffing, and transporting Bailey in a police car would not qualify as a valid investigatory detention under *Terry*. *See, e.g.*, *Florida v. Royer*, 460 U.S. 491, 504-05 (1983) (plurality opinion) (scope of valid *Terry* stop exceeded when officers required suspect to move to a different room to await the results of a search of the suspect's luggage); *Terry*, 392 U.S. at 20 (stop must be "reasonably related in scope to the circumstances which justified the interference in the first place"); *cf. Croom v. Balkwill*, 645 F.3d 1240, 1251 n.15 (11th Cir. 2011); Pet. Br. 15.

B. Search And Sweep Incident To Arrest

Incident to a custodial arrest, the police may search the arrestee without needing to assess whether it is reasonably likely that they will find evidence or weapons. *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Robinson*, 414 U.S. 218 (1973). Two interests justify a warrantless search in this context: the need to remove weapons in the arrestee's possession, and the need to prevent evidence from being concealed or destroyed. *Chimel*, 395 U.S. at 762-63. The scope of a warrantless search incident to arrest must be tailored to the dual interests that justified the search in the first instance; searches beyond that scope are not permitted. *Id.*

Two corollaries to this rule have been developed, both keyed to the same interests and concerns that justified the original rule. First, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 460 (1981). But this search must be lim-

ited to instances when the underlying justifications for the rule support it, so a search is permitted "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time." *Arizona v. Gant*, 556 U.S. 332, 343 (2009).

Second, and similarly, when police arrest a suspect inside a house, "as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Maryland v. Buie*, 494 U.S. 325, 334-37 (1990). The police may not, however, do a sweep of the entire house or look in spaces beyond the immediate vicinity, unless they make an individualized showing of facts that support this search—facts that warrant a reasonable belief that the area to be swept harbors a dangerous individual. *Id.* at 337.

In all its manifestations, the categorical rule allowing a search incident to arrest applies only when there are grounds to believe the specific person has already committed an offense that would warrant detention. An individualized determination has already been made that the person may have acted contrary to law and thus may lawfully be seized; the categorical rule in this context only serves to extend police authority from a seizure to a search as well.

C. Detention Of A Lawfully Stopped Vehicle

When the police lawfully stop a vehicle, they may also detain the occupants of the vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); *Wilson*, 519 U.S. at 413-14. The initial detention is unavoidable given the fact that the officer has a lawful reason to detain the vehicle in which the occupants are travel-

ing—because the vehicle's movements are subject to police command, the initial and temporary detention of the occupants occurs of necessity. As the Court recently explained, this authority to detain the occupants "ordinarily" continues for the duration of the stop, but the Court did not address whether this detention is automatically permitted in all cases. *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). And as the Court made clear, any search or additional imposition on an occupant must be justified individually as a *Terry* stop—that is, "the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Id.*

D. Impartial, Routine Procedures: Inventory Searches, Checkpoints, And Administrative Inspections

This Court has also upheld routine inspections based on neutral, objective procedures applied equally to all citizens. While categorical, these rules differ from the rules discussed above because they are not targeted at any specific individual or object—they are constitutional *because* they are rules of general applicability, not despite it.

First, police may conduct a routine inventory search of an impounded automobile, *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976), or an arrested individual's belongings, *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983). The police have lawful custody over the property in these situations, so an inventory search pursuant to "standard" and "routine" procedures without individualized "investigatory police motive" is permissible. *Opperman*, 428 U.S. at 376; *cf. Florida v. Wells*, 495 U.S. 1, 4 (1990) (holding an inventory search invalid without clear "standardized

criteria").

Second, the police may set up a checkpoint to briefly stop and seize vehicles without individualized assessments of probable cause for certain law enforcement ends, but the checkpoint must be conducted pursuant to set guidelines, not randomly with "unconstrained discretion." *Delaware v. Prouse*, 440 U.S. 648, 659-60 (1979); *see also Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990). The checkpoint must also meet a reasonableness balancing test looking at the policy interest, the extent the checkpoint accomplishes that interest, and the degree of personal intrusion involved. *Sitz*, 496 U.S. at 455. Acceptable checkpoint purposes include gauging driver sobriety, *id.* at 447; eliciting non-incriminating information on a recent crime, *Illinois v. Lidster*, 540 U.S. 419 (2004); and checking immigration status on roads inbound from national borders, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Yet the Court has limited even impartially administered checkpoints when their primary purposes was "general crime control," invalidating checkpoints to interdict illegal drugs because the police are not permitted to engage in the "ordinary enterprise of investigating crimes" without the usual showing of individualized suspicion. *City of Indianapolis v. Edmond*, 531 U.S. 32, 43-44, 47 (2000).

Finally, administrative inspection of closely regulated commercial property is allowed because the expectation of privacy at such businesses is diminished by the fact of pervasive regulation. *New York v. Burger*, 482 U.S. 691, 702 (1987). The warrantless inspection exception only applies to limited types of businesses that operate under a regulatory scheme

that is "sufficiently comprehensive and defined" to alert any commercial property owner of the risk of regular inspections. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). These can include firearms dealers, *United States v. Biswell*, 406 U.S. 311, 317 (1972); stone quarries or mines, *Donovan*, 452 U.S. at 602; and automobile junkyards, *Burger*, 482 U.S. at 707-08—but these enterprises are the exception, not the rule. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321-23 (1978). Outside of these exceptional and intensely regulated contexts, an inspector must obtain a warrant to provide assurance from a neutral official that the inspection is reasonable, authorized by statute, and pursuant to a plan embodying specific neutral criteria. *Id.*

II. CATEGORICAL RULES OFTEN EXPAND BEYOND THEIR JUSTIFICATIONS TO BE SEEN AS POLICE ENTITLEMENTS

Where this Court has fashioned categorical rules to address a specific problem, the Court has done so carefully, recognizing that these rules must be narrowly crafted to ensure compliance with the Fourth Amendment's requirement that all searches and seizures be reasonable. *E.g.*, *Buie*, 494 U.S. at 334-37 (rejecting broad categorical rule proposed by state).

But even carefully constructed rules can expand in their application. Rules that were once a balance of competing concerns—a delicate equilibrium struck between police safety and individual liberty—become distorted as law enforcement officers grow to treat their once exceptional authority as a prerogative. When that happens, this Court has not hesitated to trim back these rules and align them with their underlying justifications. *See Gant*, 556 U.S. at 343

(limiting *New York v. Belton*); *Knowles v. Iowa*, 525 U.S. 113 (1998) (limiting *Chimel v. California*); *Vale v. Louisiana*, 399 U.S. 30 (1970) (restricting *Agnello v. United States*).

The rule announced in *New York v. Belton* provides a useful illustration of this process of expansion over time. Applying earlier rulings allowing a search incident to an arrest, this Court in *Belton* concluded that "when a policeman has made a lawful custodial arrest of the occupant of an automobile he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, 453 U.S. at 460.

This categorical rule had been grounded in earlier holdings, notably *Chimel*, 395 U.S. at 763, which had specifically identified two interests that justified a warrantless search incident to arrest: the need to remove weapons in the arrestee's possession, and the need to prevent evidence from being concealed or destroyed. *Id.* at 762-63. These justifications supported a categorical justification for a search of the area "within [the] immediate control" of the arrestee, which the *Chimel* Court construed "to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* As the *Chimel* Court took pains to point out, the scope of the search must be limited to the dual interests that permitted the search in the first instance. *Id.*

Despite the fact that *Belton* had been grounded in the analysis of *Chimel* and relied on the same justifications, the opinion did not specifically limit the scope of the permissible vehicle search to only those areas within the arrestee's immediate control. *Belton*, 453 U.S. at 460. Lacking an explicit boundary,

lower courts allowed the rule to swell far beyond the original justifications, permitting the police to engage in a full vehicle search even when the arrestee was handcuffed or had already left the scene. *See Thornton v. United States*, 541 U.S. 615, 628 (2004); *Gant*, 556 U.S. at 342 & nn.2-3. The *Belton* decision became "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 556 U.S. at 341.

As the rule expanded, police and lower courts began "to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part). Indeed, one case, "[w]hen asked at the suppression hearing why the search was conducted," the police officer "responded: 'Because the law says we can do it.'" *Gant*, 556 U.S. at 336-37.

This shift is easy to understand; if a categorical rule "entitles an officer to search a vehicle upon arresting the driver despite having taken measures that eliminate any danger, what rational officer would not take those measures?" *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) ("The popularity of the practice [of detaining the suspect and subsequently searching the vehicle] is not hard to fathom."). Indeed, this is part of the perpetual cycle of categorical rules; *Chimel* itself noted that the categorical rule it announced was intended to trim back an earlier, broader categorical rule under which police could take "the opportunity to engage in

searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere." *Chimel*, 395 U.S. at 767. This process of expansion is understandable, and it is inevitable with categorical rules.

But it is not constitutional. Rather than acquiescing to the broad reading of *Belton* adopted by law enforcement officials and lower courts, this Court in *Arizona v. Gant* pared back the expanded version of the rule and realigned the rule with its constitutional justifications. 556 U.S. at 343.

In seeking to uphold a broad reading of *Belton*, the government had argued that an "expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle." *Gant*, 556 U.S. at 344. The Court rejected this claim, explaining that the state's analysis "seriously undervalues" the individual privacy concerns while at the same time "exaggerates the clarity that its reading of *Belton* provides." *Id.* at 345. The Court thus limited vehicle searches to those situations closely tied to the underlying evidence and safety justifications, explaining that "[t]o read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception." *Id.* at 343.

This same series of events—this Court setting out a categorical authorization of specific police conduct, which then expanded over time in the lower courts until the scope of the rule became unmoored from its justifications—has been repeated in the other contexts where the Court has allowed categorical rules. For instance, lower courts applying the rule set out

by the Court allowing a search incident to arrest, *see Chimel*, 395 U.S. at 763, extended this rule to uphold searches incident to a mere citation when the suspect was not taken into custody. In *Knowles v. Iowa*, 525 U.S. 113 (1998), this Court rejected the expansion of the rule as inconsistent with its underlying rationales, noting neither officer safety nor evidentiary concerns underlying the rule could support categorical permission to search. *Id.* at 117-19.

Similarly, this Court long ago suggested that officers could search a house if arresting one of its occupants. *E.g.*, *Agnello v. United States*, 269 U.S. 20, 30 (1925). Over time, however, lower courts began to expand the doctrine of search incident to arrest to justify the search of the inside of a house when an occupant of that house was arrested outside. That doctrinal expansion was restricted by this Court in *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). In *Vale*, the Court emphasized that the mere fact the police thought evidence might be inside the house was an insufficient basis for limiting Fourth Amendment rights. *Id.* at 33-34. The Court noted that the officers had been able to procure warrants for the arrest of the individual, and had information that he was residing at the address where they found him, and there was "thus no reason, so far as anything before us appears, to suppose that it was impracticable for them to obtain a search warrant as well." *Id.* at 35.

III. THE ORIGINALLY NARROW *SUMMERS* RULE HAS BECOME A BROAD POLICE ENTITLEMENT

This Court adopted the *Summers* rule on the ground that "the character of the additional intrusion caused by detention is slight and because the

justifications for detention are substantial." *Muehler*, 544 U.S. at 98. Yet, like the other contexts where this Court has created a categorical rule under the Fourth Amendment, lower courts and law enforcement personnel have come to view their *Summers* authority as a police entitlement rather than the ability to conduct a limited and purely incidental detention. *See United States v. Sherrill*, 27 F.3d 344, 346-37 (8th Cir. 1994) (noting that "the officers had no interest in preventing flight or minimizing the search's risk" and indicating that "the police officers may not have believed that they had probable cause to arrest [the defendant], and indeed, did not apply for an arrest warrant when they applied for the search warrant"); *United States v. Bohannon*, 225 F.3d 615, 618 (6th Cir. 2000) (Batchelder, J., dissenting); *United States v. Edwards*, 103 F.3d 90, 93-94 (10th Cir. 1996).

The record in this case illustrates the point well. Testimony from the grand jury proceeding suggested that the police would routinely "surveil the house just in case someone leaves so that we can hold onto them until we actually do execute the warrant." Pet. Br. App. 2a. And the lower court's analysis speaks volumes regarding the shift of *Summers* from limited rule to police entitlement. The court of appeals reasoned that *Summers* should allow detention even when the occupants have left the premises, because any other rule

> would put police officers executing a warrant in an impossible position: when they observe a person of interest leaving a residence for which they have a search warrant, they would be required either to de-

> tain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered).

United States v. Bailey, 652 F.3d 197, 205 (2d Cir. 2011). But the court's "impossible position" discounts an obvious and viable choice: when the occupant of the premises is unaware of the warrant and will pose no risk to officer safety once he leaves the scene, the officer should simply let him leave, running his license plate through the system or following him if the police consider it essential to track his location.

Indeed, this is precisely the same "dilemma" that the Court confronted when considering the scope of a search incident to arrest, where proponents of a broad rule argued that requiring an officer to conduct the search at the time of arrest would effectively "penalize" the officer "for having taken the sensible precaution of securing the suspect in the squad car first." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring in the judgment). While it naturally "does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures," the premise that this sort of choice is required falsely "assumes that, one way or another, the search must take place." *Id.* In fact,

> conducting a . . . search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful. If "sensible police procedures" require that suspects be handcuffed and put in squad cars, then po-

> lice should handcuff suspects, put them in squad cars, and *not conduct the search*.

Id. (emphasis added).

So too here. In reasoning that it is sensible for officers to wait until the occupant travels some distance away from the premises before detaining him, the court of appeals operated on the mistaken assumption that a *Summers* detention *must take place*. But *Summers* is an exception to the Fourth Amendment's usual rule of case-by-case adjudication of reasonableness, and not the government's right.

When the driving force behind an officer's decision to conduct a *Summers* detention is the possibility that such a detention will facilitate the individual's eventual arrest (should contraband be found), the rule no longer serves a justifiable purpose. As set out in the petitioner's brief, any officer safety concerns are attenuated when the subject has left the house without any awareness that a search is imminent,[2] and the other two justifications cited in *Summers* are best understood as ancillary concerns unable to support a seizure and detention on their own in the absence of probable cause or even reasonable suspicion. Pet. Br. 17-18.

The shift of *Summers* from categorical but nar-

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[2] Respondent has advanced the argument that officer safety concerns are still implicated in this situation because the individual could return to the premises and attempt to forcibly interfere with the search. But as petitioner's brief shows, the government's theory is highly implausible, and even if such a scenario were likely to occur, this logic would seemingly justify the detention of any individual believed to be an occupant of the premises at *any* time or location prior to the execution of the warrant. Pet. Br. 25-26; ACLU/Cato Br. 5-8, 17-20.

row exception to individualized inquiries to a categorical and broad police entitlement to detain individuals for no good reason should not be allowed. As set out above, *supra* Part I, the *Summers* rule allows the most severe and lasting seizure of the person of any categorical rule this Court has permitted under the Fourth Amendment. And detention under this rule increasingly represents a severe and significant infringement on individual liberty. *See* ACLU/Cato Br. 5-8.

For instance, *Summers* appears to permit the detention of occupants for the entire duration of a search, which sometimes takes hours. A two- to three-hour detention has been deemed "plainly permissible" under the *Summers* categorical rule. *Muehler*, 544 U.S. at 98, 100. Applying this rule, courts have upheld prolonged and substantial detentions. *E.g.*, *Unus v. Kane*, 565 F.3d 103, 110 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1137 (2010) (detention longer than four hours "reasonable" and not false imprisonment); *Croom*, 645 F.3d at 1251-52 (two-hour detention of elderly and infirm woman reasonable under *Summers* and *Muehler*).

Moreover, *Summers* often permits the use of reasonable force to effect the detention. *Muehler*, 544 U.S. at 98-99. Occupants are often shackled for hours as the search proceeds. *Id.* at 100 (woman left in handcuffs for several hours, despite requests that they be removed because of pain); *Unus*, 565 F.3d at 110 (two women handcuffed in their residence and not permitted to wear their head scarves or pray outside presence of male officers); *Croom*, 645 F.3d at 1252-53 ("Though we are skeptical that the force alleged was truly necessary under the circumstanc-

es, we cannot find a constitutional violation based on its usage.").

In addition, some lower courts apply the *Summers* rule to permit the automatic detention of visitors to the premises, even sudden visitors with no apparent connection to the location. *See* 2 Wayne LaFave, *Search and Seizure* § 4.9 nn.123-26 (West 4th ed. 2011) (collecting cases showing wide disagreement and confusion on how to apply "occupant" requirement of *Summers*). *Summers* permitted the detention of all "occupants" of the premises but did not define that term, and many courts have construed *Summers* to authorize detention of "all persons present on the premises." *United States v. Sanchez*, 555 F.3d 910, 918 (10th Cir.), *cert denied*, 556 U.S. 1145 (2009); *see United States v. Bullock*, 632 F.3d 1004 (7th Cir. 2011) (detention of defendant allowed under *Summers* even though police knew defendant did not live in building).

Finally, the court below, like many others, have extended *Summers* to permit the detention of individuals who have left the immediate vicinity of the property. Pet. App. 3a-4a, 19a; *see United States v. Montieth*, 662 F.3d 660, 666-67 (4th Cir. 2011); *Bullock*, 632 F.3d at 1011; *United States v. Cavazos*, 288 F.3d 706, 712 (5th Cir. 2002); *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991). But this extension, like others, swells the scope of the rule far beyond its original justifications. Because *Summers* authorizes seizures undertaken without any individualized consideration that may too easily exceed the limits of reasonableness, the boundaries of the rule must be clearly drawn and strictly enforced.

* * *

Just like the rule in *Belton*, the *Summers* rule has "generated a great deal of uncertainty, particularly for a rule touted as providing a 'bright line.'" *Gant*, 556 U.S. at 345-46. Like all categorical rules, *Summers* was designed to be a limited exception to the normal requirements of the Fourth Amendment, allowing intrusions that are neither sanctioned by an impartial magistrate nor supported by an individualized finding of reasonableness. But lower courts have too often failed to appreciate the boundaries of the *Summers* rule, boundaries that are critical to minimizing the infringement on personal liberty that a *Summers* detention represents. This Court should limit the scope of the rule to its constitutional grounding, ensuring that the only intrusions it permits are ones that are truly reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons and those stated in the petitioner's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-770

OFFICE OF THE

IN THE SUPREME COURT OF THE UNITED STATES

CHUNON L. BAILEY, A/K/A POLO,
Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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Cases

Arizona v. Gant,
556 U.S. 332 (2009) 5, 6, 8

Begay v. United States,
553 U.S. 137 (2008) 11

Chimel v. California,
395 U.S. 752 (1969) 5

Dawson v. City of Seattle,
435 F.3d 1054 (9th Cir. 2006) 7

Denver Justice & Peace Committee v. City of Golden,
405 F.3d 923 (10th Cir. 2005) 7

Dunaway v. New York,
442 U.S. 200 (1979) 5

Fowler v. United States,
131 S. Ct. 2045 (2011) 11

Heitschmidt v. City of Houston,
161 F.3d 834 (5th Cir. 1998) 7

J.D.B. v. North Carolina,
131 S. Ct. 2394 (2011) 11

Katz v. United States,
389 U.S. 347 (1967) 5

Knowles v. Iowa,
525 U.S. 113 (1998) 8

Leveto v. Lapina,
258 F.3d 156 (3d Cir. 2001) 7

Maryland v. Wilson,
519 U.S. 408 (1997) 10

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010) 10

Michigan v. Bryant,
131 S. Ct. 1143 (2011) 11

Michigan v. Summers,
452 U.S. 692 (1981) ..... passim

New York v. Belton,
453 U.S. 454 (1981) 5

Terry v. Ohio,
392 U.S. 1 (1968) 11

Thornton v. United States,
541 U.S. 615 (2004) 10

United States v. Bailey,
652 F.3d 197 (2d Cir. 2011) 2, 3

United States v. Bullock,
632 F.3d 1004 (7th Cir. 2011) 9

United States v. Castro-Portillo,
211 F. App'x 715 (10th Cir. 2007) 9

United States v. Cavazos,
288 F.3d 706 (5th Cir. 2002) 9

United States v. Cochran,
939 F.2d 337 (6th Cir. 1991) 9

United States v. Montieth,
662 F.3d 660 (4th Cir. 2011) 9

United States v. Robinson,
414 U.S. 218 (1973) 5

United States v. Sears,
139 F. App'x 162 (11th Cir. 2005) 9

Unus v. Kane,
565 F.3d 103 (4th Cir. 2009) 7

Constitution and Statutes

U.S. Const. Amend. IV ..... passim

Georgia Code Ann. § 17-5-28 15

725 ILCS § 5/108-9 15

Iowa Code § 808.7 15

Kansas Stat. Ann. § 22-2509 15

Montana Code Ann. § 46-5-228(2) 15

Nevada Revised Stat. § 179.055(3) 15

N.Y. Crim. Proc. Law § 690.15 (McKinney) 15

Wisconsin Stat. § 968.16 15

Miscellaneous

Boston, Massachusetts Police Department, *Search Warrant Execution Procedures*, CityofBoston.gov, *available at* http://tinyurl.com/BostonPD 17, 18

Chandler, Arizona Police Department, *General Orders, D-34 Search Warrants, Subject 200 Executing Search Warrants*, chandlerpd.com, *available at* http://tinyurl.com/ChandlerPD 16

Chicago, Illinois Police Department, *Chicago Police Department Directives Special Order S05-05(V)*, directives.chicagopolice.org, *available at* http://tinyurl.com/ChicagoSWAT 18

Cincinnati, Ohio Police Department, *Search Warrants/Consent to Search*, C(6)(i); D(2), cincinnati-oh.gov, *available at* http://tinyurl.com/CinciPD 18

Federal Bureau of Investigation, *A Word about UCR Data*, FBI.gov, *available at* http://tinyurl.com/aboutUCR 10

Federal Bureau of Investigation, *About LEOKA 2010*, FBI.gov, *available at* http://tinyurl.com/AboutLeoka 9

Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2006, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/LEOKA2006 11

Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2007, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/2007LEOKA 11, 12

Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2008, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/LEOKA2008 .....11, 13

Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2009, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/LEOKA2009 11

Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2010*, FBI.gov, *available at* http://tinyurl.com/FBI2010 9

Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2010, Methodology*, FBI.gov, *available at* http://tinyurl.com/LEOKAMethod.....10

Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2010, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/LEOKASummary 11, 12

Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2010, Table 19* FBI.gov, *available at* http://tinyurl.com/LEOKATable19 13

Federal Bureau of Investigation, *LEOKA Reporting Form*, FBI.gov, *available at* http://tinyurl.com/LEOKAform.....10

Iowa City, Iowa Police Department, *General Order on Search and Seizure*, icgov.org, *available at* http://tinyurl.com/IowaCityPD 17

Kansas City, Missouri Police Department, State Search Warrant Procedures, No. 09-14, kcmo.org, *available at* http://tinyurl.com/KanCityPD 17

Kenosha, Wisconsin Police Department, *Search of a premises with and without a warrant*, Section IV.A.4(c), kenoshapolice.com, *available at* http://tinyurl.com/KenoshaPD.....17

Lake City, Florida Police Department, *Searches, General Orders Manual*, lcfla.com, *available at* http://tinyurl.com/LakeCityPD.....16

Los Angeles, California Police Department, *Department Manual* 4/742.20, lapdonline.org, *available at* http://tinyurl.com/LAPDSWAT 18

Mark V. Lonsdale, *Raids: A Tactical Guide to High Risk Warrant Service* (1991) 19

Minneapolis, Minnesota Police Department, *Policy & Procedure Manual 9-303*, minneapolismn.gov, *available at* http://tinyurl.com/MinnSWAT 18

Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 JUST. Q. 607 (1997) 19

Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS., no. 1 (1997) 19

Pine Bluff, Arkansas Police Department, *Policies and Procedures Manual, Executing a Search Warrant*, pbpd.org, *available at* http://tinyurl.com/PineBluffPD 16

Scottsdale, Arizona Police Department, *Field Orders; Arrest and Search*, ScottsdaleAZ.gov, *available at* http://tinyurl.com/ScottsdalePD 17

Wayne R. LaFave, *3 Search and Seizure* (4th ed. 2004) 6

INTEREST OF THE AMICUS[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. The NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

Among the NAFD's guiding principles is its commitment to promote fair adjudication in criminal matters by appearing as *amicus curiae* in cases of significant and recurring importance to indigent defendants. The question presented here implicates important liberty interests protected by the Fourth Amendment and recurs with significant frequency in the daily administration of criminal law and related prosecutions.

The NAFD accordingly has a strong interest in the matter and submits this *amicus* brief in support of petitioner Chunon L. Bailey. The NAFD respectfully urges the Court to reverse the Second Circuit's decision and to hold that the Fourth

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[1] A letter from the Solicitor General consenting to the filing of this brief is being filed with the Clerk of the Court, pursuant to Rule 37.3(a). Petitioner filed a blanket consent to *amicus* briefs. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Amendment prohibits police from detaining, incident to the execution of a search warrant for contraband, occupants who have left the immediate vicinity of the premises to be searched.

BACKGROUND

On July 28, 2005, local police on Long Island, New York, obtained a warrant to search an apartment for a .380-caliber handgun. *United States v. Bailey*, 652 F.3d 197, 200 (2d Cir. 2011). In conducting surveillance of the location before executing the warrant, two officers observed petitioner and another individual leave the gate that led to the apartment and drive away. *Id.* The record contains no evidence showing that the police had reason to believe petitioner knew of their presence or the planned search. Brief of Petitioner Chunon L. Bailey ("Pet. Br.") at 4.

The police nonetheless followed petitioner, pulled him over, and questioned him. *Bailey*, 652 F.3d at 200-01. When the police asked the petitioner where he was coming from, the petitioner said he was coming from his house at 103 Lake Drive. *Id.* at 201. The detention, the police told petitioner, was not an arrest, but rather a measure taken incident to the search of the apartment a mile away. *Id.* A pat-down search following the car stop led police to discover a key to the apartment in petitioner's pocket. *Id.* After being informed of the search, in response to questions put to him during the detention, petitioner stated: "Anything you find there [in the apartment] ain't mine, and I'm not cooperating with your investigation." *Id.*

The ensuing search of the apartment by a different team of officers turned up narcotics and

firearms, which led to petitioner's indictment for federal criminal offenses. *Id.* Lacking direct evidence linking petitioner to the contraband, the government sought to connect petitioner to those items by introducing the key recovered from him during the stop, as well as petitioner's statements. Petitioner moved to suppress this evidence as the fruit of an unlawful seizure under the Fourth Amendment. The district court denied the motion, and a jury trial ended with guilty verdicts on all counts. *Id.* Petitioner was thereafter sentenced to 30 years' imprisonment. *Id.*

The key issue on appeal was whether petitioner's detention violated the Fourth Amendment. The Second Circuit held it did not, reading *Michigan v. Summers*, 452 U.S. 692 (1981), to "authorize[ ] law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected *as soon as reasonably practicable*." *Bailey*, 652 F.3d at 208 (emphasis in original).

"[T]he interests of law enforcement in the safety of the officers and the preservation of evidence," the Second Circuit reasoned, justified application of the *Summers* rule to instances where an individual has left the immediate vicinity of the place to be searched. *Id.* at 205. The court also underscored what it perceived as the "*de minimis*" intrusion on petitioner's liberty resulting from the car stop. *Id.*

SUMMARY OF ARGUMENT

By its terms, the Fourth Amendment requires individual case-by-case determinations of whether a challenged search or seizure was unreasonable. The U.S. Reports are replete with instances of the Court's insistence on precisely this approach. Bright-line rules authorizing searches or seizures independent of any individualized determination based on the totality of circumstances are the rare exception. No new blanket authority should be approved here, as the government cannot justify an expansion of the rule announced in *Summers* to cover individuals who have left the home to be searched, and who may present no safety risk whatsoever to law enforcement.

A review of the available empirical data contains no indication that individuals who have left premises to be searched for contraband return with any regularity to threaten officer safety. Moreover, neither state lawmakers nor law enforcement officials have seen fit in the three decades since *Summers* to systematically codify or formalize any detention authority or policies vis-à-vis persons who have recently left the premises to be searched.

This case presents the Court with the opportunity to underscore the precept that categorical Fourth Amendment rules are generally to be avoided, and can only be appropriate when justified by demonstrable need. Accordingly, the NAFD supports the position of the petitioner and urges the Court to hold that *Summers* should not be extended to encompass the detention of persons known to have recently occupied a residence where a search warrant for contraband is to be executed.

ARGUMENT

I. CATEGORICAL RULES ARE THE RARE EXCEPTION UNDER THE FOURTH AMENDMENT.

No principle is more entrenched under the Fourth Amendment than this Court's repeated admonition that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)); *see also Dunaway v. New York*, 442 U.S. 200, 213 (1979). Exceptions to the warrant requirement are limited, and bright-line rules that operate without individualized determinations—thereby eliminating the case-by-case reasonableness inquiries at the heart of Fourth Amendment doctrine—are rare.

On those few occasions resulting in the adoption of a bright-line rule, the Court has engaged in a balancing of competing interests and determined that a particularly strong government interest outweighed the intrusion upon the individual's interest in freedom from a particularly defined type of intrusion under the Fourth Amendment. *See, e.g.*, *New York v. Belton*, 453 U.S. 454, 460 (1981) (authorizing search of an automobile's passenger compartment upon a custodial arrest); *United States v. Robinson*, 414 U.S. 218, 234-35 (1973) (authorizing search of an individual incident to arrest); *Chimel v. California*, 395 U.S. 752, 763 (1969) (authorizing a

warrantless search of the arrestee's person and the "area within his immediate control").

These decisions make plain the definitional challenges inherent in formulating categorical rules: The Court must articulate the scope of a rule's application with sufficient precision to provide the intended bright-line guidance and to "produce results approximating those which would be obtained if accurate case-by-case application of the underlying principle were possible." Wayne R. LaFave, 3 *Search and Seizure: A Treatise on the Fourth Amendment* § 7.1 (4th ed. 2004). So, too, is it necessary for the Court to "ensure[ ] that the scope [of the categorical rule] is commensurate with its purposes." *Gant*, 556 U.S. at 339.

Ample illustration of these points appears in the Court's rationale for adopting the categorical rule that is front and center here. In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court approved the "routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant." *Id.* at 705 n.21. The Court explained that such detention would reduce the risk of harm to the officers conducting the search, preclude suspects' flight in the event incriminating evidence is discovered, permit residents to facilitate an orderly search, and prevent efforts to conceal or destroy evidence. *Id.* at 702-03.

On the other side of the balance, the Court concluded that the degree of intrusion upon detainees' individual interests is minimal when the detention is in their own residence and the warrant is for contraband. *Id.* at 701-02. The residential character of the premises permitted the Court to

"safely assume" that "most citizens—unless they intend flight to avoid arrest—would elect to remain in order to observe the search of their possessions." *Id.* at 701. In addition, because the detention is in the person's "own residence, it could add only minimally to the public stigma associated with the search itself." *Id.* at 702. Meanwhile, the warrant's identification of contraband was significant because it meant that a judicial officer had already "determined that police have probable cause to believe that someone in the home is committing a crime," so that a "suspicion of criminal activity justifies a detention of [the occupants]." *Id.* at 703-04.[2]

By emphasizing these limitations, the Court ensured that the government interests furthered by a bright-line rule would consistently outweigh what in context was only an "incremental intrusion on personal liberty." *Id.* at 703. In seeking an expansion of the *Summers* rule, the government thus bears a

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[2] *Summers* reserved the question of whether the detention authority it approved may be exercised when a warrant "merely authorize[s] a search for evidence," as distinct from contraband. 452 U.S. at 705 n.20. The circuits have split on this question. The better view recognizes the distinction to be crucial, as "the existence of mere evidence ... on the premises does not suggest that a crime is being committed," and therefore the *Summers* "rationale justifying detention based on the occupant's connection to the premises is not applicable." *Leveto v. Lapina*, 258 F.3d 156, 172 (3d Cir. 2001) (Alito, J.) (citation and internal quotation marks omitted). *Accord Denver Justice & Peace Comm. v. City of Golden*, 405 F.3d 923, 931 (10th Cir. 2005); *Heitschmidt v. City of Houston*, 161 F.3d 834, 838 (5th Cir. 1998); *contra Unus v. Kane*, 565 F.3d 103, 119-20 (4th Cir. 2009); *Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006).

significant burden. At the very least, to support the adoption of a broader bright-line rule, it needs to demonstrate that:

- the interest in officer safety is supported by a cognizable threat from residents who have recently left the home to be searched;
- this threat is implicated in most cases; and
- on balance, the Fourth Amendment intrusion resulting from the detention of recent occupants away from their home is justified by the strength of the government's interest.

The weight of the government's burden is clear from prior cases. In *Arizona v. Gant*, for example, the government sought a rule allowing searches of a vehicle incident to arrest where the individual arrested had been secured by police and had lost access to the vehicle. 556 U.S. at 344-45. The Court declined the invitation, holding that the government failed to show that, in this circumstance, permitting a search of the car sufficiently furthered interests in officer safety and evidence preservation to warrant extension of the rule of *Belton*. *Id.* at 346; *see also Knowles v. Iowa*, 525 U.S. 113, 115-16 (1998), (holding that officers may not categorically search vehicles incident to stops for traffic violations).

II. EMPIRICAL EVIDENCE DEMONSTRATES NO SYSTEMATIC OR REGULAR THREAT TO OFFICER SAFETY FROM INDIVIDUALS WHO HAVE LEFT A PREMISES TO BE SEARCHED.

Whether the government interests advanced here—foremost officer safety—justify an extension of

Summers is a question amenable to empirical analysis. The Court should therefore insist that the government demonstrate the existence of meaningful and recurring safety risks calling for a new (and disfavored) categorical rule under the Fourth Amendment.

Neither the Second Circuit nor any other circuit court that has endorsed similar expansions of *Summers* cited any empirical studies, expert testimony, or other evidence to support their assumption that individuals who have left a premises to be searched present a recurring threat to officer safety.[3] Indeed, available empirical data supports the conclusion that there is no systemic safety risk from recent occupants that would justify the expansion of *Summers*'s categorical rule to such persons.

For nearly 40 years, the Federal Bureau of Investigation has collected and published data on police homicides, accidental deaths, and assaults. Federal Bureau of Investigation, *About LEOKA 2010*, FBI.gov, *available at* http://tinyurl.com/AboutLeoka. The most recent compilation of these data appears in a publication entitled "Law Enforcement Officers Killed and Assaulted," available on the FBI's website. Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2010*,

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[3] *See, e.g.*, *United States v. Montieth*, 662 F.3d 660 (4th Cir. 2011); *United States v. Bullock*, 632 F.3d 1004 (7th Cir. 2011); *United States v. Castro-Portillo*, 211 F. App'x 715 (10th Cir. 2007); *United States v. Sears*, 139 F. App'x 162 (11th Cir. 2005); *United States v. Cavazos*, 288 F.3d 706 (5th Cir. 2002); *United States v. Cochran*, 939 F.2d 337 (6th Cir. 1991).

FBI.gov, *available at* http://tinyurl.com/FBI2010 (hereinafter "FBI Crime Report").

The FBI Crime Report contains data from over 18,000 participating federal, state, local, and tribal law enforcement agencies and several nonprofit organizations. Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2010, Methodology*, FBI.gov, *available at* http://tinyurl.com/LEOKAMethod; Federal Bureau of Investigation, *A Word about UCR Data*, FBI.gov, *available at* http://tinyurl.com/aboutUCR. The FBI's primary objective in assembling and publishing its Crime Report data is to "generate a reliable set of crime statistics for use in law enforcement administration, operation, and management." Federal Bureau of Investigation, *A Word about UCR Data*, FBI.gov, *available at* http://tinyurl.com/aboutUCR.[4] The Court has relied on the FBI's data on prior occasions to assess the risk certain encounters pose to officer safety. *See, e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 413 (1997); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3127 (2010) (Breyer, J., dissenting); *Thornton v. United States*, 541 U.S. 615, 626 (2004) (O'Connor, J., concurring).[5]

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[4] To ensure these data are uniformly reported, the FBI provides contributing law enforcement agencies with a handbook explaining how to classify and score offenses and supplies uniform crime offense definitions. Federal Bureau of Investigation, *A Word about UCR Data*, FBI.gov, *available at* http://tinyurl.com/aboutUCR. *See also* Federal Bureau of Investigation, *LEOKA Reporting Form*, FBI.gov, *available at* http://tinyurl.com/LEOKAform.

[5] The Court has also relied on other FBI crime reports, not related specifically to crimes against law enforcement

One section of the FBI Crime Report includes narrative accounts summarizing the circumstances of each felonious killing of a police officer in the line of duty. *See* Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2010, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/LEOKASummary. As the FBI aims to collect this information for every such homicide, the report constitutes a comprehensive set of relevant data compiled by an entity with a manifest interest in assembling the fullest information available.

A review of the five most recent FBI Crime Reports did not reveal a single incident supporting the extension of *Summers* endorsed by the Second Circuit.[6] Indeed, these Crime Reports contain not one

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officers. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 23-24, n.21 (1968) (relying on the FBI's report entitled "Uniform Crime Reports for the United States"); *Michigan v. Bryant*, 131 S. Ct. 1143, 1172 n.5 (2011) (Scalia, J., dissenting) (discussing the FBI's report entitled, "Crime in the United States"); *J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2417, n.11 (2011) (Alito, J., dissenting) (same); *Fowler v. United States*, 131 S. Ct. 2045, 2052 (2011) (same); *Begay v. United States*, 553 U.S. 137, 157, n.4 (2008) (Alito, J., dissenting).

[6] The reports for 2006-2009 can be found at: Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2006, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/LEOKA2006; Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2007, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/2007LEOKA; Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2008, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/LEOKA2008; Federal Bureau of Investigation, *Law Enforcement Officers Killed and*

reported incident in which an individual whom police observed leave the area shortly before the search returned during the warrant's execution and attacked officers.

Of the 238 officer deaths from 2006-2010 for which the FBI Crime Reports included a narrative summary,[7] thirteen involved an officer attempting to serve or execute a warrant.[8] Of those twelve, seven involved officers who were attempting to serve an *arrest* warrant and six involved officers who were executing a *search* warrant. In all but one of the six search warrant cases, the officers were killed by individuals *inside* the premises being searched—circumstances falling squarely within the rule of *Summers*.[9]

Assaulted 2009, Summaries of Officers Feloniously Killed, FBI.gov, *available at* http://tinyurl.com/LEOKA2009.

[7] In limited instances, the Report does not include summaries due to insufficient information, gag orders, or other unusual circumstances. Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2010, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/LEOKASummary.

[8] These thirteen cases do not include homicides for which the narrative summary references a warrant only tangentially, as, for example, when an officer made a traffic stop and subsequently learned there was a warrant for the arrest of a person in the vehicle.

[9] In one of the *arrest* warrant cases, an officer was killed while attempting to apprehend an individual who had taken flight. *See* Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2007, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/2007LEOKA (reporting death of officer in San Antonio, Texas). But whether police may detain a person who

In the one remaining case, an officer was shot and killed by an individual who arrived at his residence as the police waited to execute the search warrant. *See* Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2008, Summaries of Officers Feloniously Killed*, FBI.gov, *available at* http://tinyurl.com/LEOKA2008 (describing September 28, 2008 incident in Illinois). But this incident would also fall comfortably within the rule of *Summers*. Once the individual appeared at the premises, officers could detain him incident to the execution of the search warrant.

The empirical analysis extends even further. Another section of the FBI Crime Report aggregates data on officers killed or injured by event category. For example, the FBI has compiled the number of officers killed or injured during traffic stops and pursuits, in arrest situations, in responding to burglaries, while engaged in investigative activities, and in other tactical situations. *See* Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted 2010, Table 19* FBI.gov, *available at* http://tinyurl.com/LEOKATable19.

In all, the FBI has aggregated data regarding ten different event categories, yet it has found no occasion to collect data for the execution of search warrants as a discrete activity. For example, while the "tactical situation" category can include warrant execution, the category also includes plainly more dangerous circumstances—including barricaded

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flees the premises upon sighting police is not the question presented. There is no indication here that petitioner was aware of a police presence at the time he left the residence. Pet. Br. at 4.

offender situations and hostage taking. *Id.* It is a fair inference from the omission of any search warrant execution category that this activity, as such, has not been thought in law enforcement circles to trigger any special or recurring safety concerns. While it is conceivable that the authority approved in *Summers* accounts for the absence of such evidence, it remains significant that the FBI has not ascertained and reported any recurring threat to officers from persons not present on the premises to be searched.

In the end, the available empirical data does not support a conclusion that the execution of search warrants carries a systematic risk of harm to the police from individuals who have left the scene of the search. Thus, the government cannot satisfy its burden of justifying a new bright-line rule authorizing the detention of persons who have recently occupied a residence where officers are to execute a search warrant for contraband.

III. NEITHER STATE LAWMAKERS NOR LAW ENFORCEMENT POLICYMAKERS HAVE SOUGHT TO EXERCISE A CATEGORICAL AUTHORITY TO DETAIN RECENT OCCUPANTS.

The government's position fails for the additional reason that it ignores state lawmakers' and law enforcement officials' own readiness, over the three decades since *Summers* was decided, to draw a bright line between residents present at the home to be searched and residents who have left the premises.

A. State Laws Codifying Officers' Detention Authority Do Not Extend To Recent Occupants.

Several states have enacted laws defining whom police officers may detain incident to the execution of a search warrant. For example, New York state law authorizes "a search of any person present thereat or therein." N.Y. Crim. Proc. Law § 690.15 (McKinney). Illinois law similarly allows a law enforcement officer executing a search warrant to "search any person in the place at the time: (a) To protect himself from attack, or (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant." 725 ILCS § 5/108-9. Other examples abound.[10]

These laws are even more telling for what they do not authorize: detention of individuals not present within the searched premises or at the scene of the search. If individuals known to have recently left the premises posed a regular threat to officers, state legislators would be expected to confront this risk by authorizing police to detain recent occupants. Lawmakers have found no cause to confer any such authority.

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[10] *See, e.g.*, Georgia Code Ann. § 17-5-28 (authorizing officers to reasonably detain and search "any person in the place at the time"); Iowa Code § 808.7 (same as to "any person or thing in the place at the time"); Kansas Stat. Ann. § 22-2509 ("any person in the place at the time"); Montana Code Ann. § 46-5-228(2) ("any person on the premises being searched at the time of the search"); Nevada Rev. Stat. § 179.055(3) ("any person in the place at the time"); Wisconsin Stat. § 968.16 ("any person on the premises at the time").

B. Police Manuals Direct Officers To Detain Only Persons At Or In The Immediate Vicinity Of The Premises.

Numerous policy and procedure manuals offer no indication that police forces have been impaired by refraining from any categorical detention practice with respect to persons who have recently left premises where a search warrant is to be executed. In fact, several such manuals address the execution of search warrants without referencing any threat to officers from persons not present at the time police commence the search.[11]

Manuals which do address the category of persons not present on the premises identify ready means for securing officers' safety without the need for off-site detentions. For example:

- The Boston Police Department instructs its "entry personnel" team to "[c]ontain[ ] the area perimeter and target structures(s)," "gain[ ] control of all persons inside the target location using that amount of force as is reasonably necessary," and "establish[ ] that the target

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[11] For example, the following police manuals discuss executing search warrants and procedures to prepare for internal threats, but do not discuss external threats: Chandler, Arizona Police Department, *General Orders, D-34 Search Warrants, Subject 200 Executing Search Warrants*, chandlerpd.com, *available at* http://tinyurl.com/ChandlerPD; Pine Bluff, Arkansas Police Department, *Policies and Procedures Manual, Executing a Search Warrant*, pbpd.org, *available at* http://tinyurl.com/PineBluffPD; Lake City, Florida Police Department, *Searches, General Orders Manual*, lcfla.com, *available at* http://tinyurl.com/LakeCityPD.

location is secure." "Perimeter security personnel" are instructed to "[e]nsur[e] that no unauthorized persons escape from or enter the premises while the search is being conducted" and should "remain[ ] outside the premises until ordered to enter by the supervisor." Boston, Massachusetts Police Department, *Search Warrant Execution Procedures*, CityofBoston.gov, *available at* http://tinyurl.com/BostonPD.

- The Iowa City Police Department's manual provides that officers should conduct a "Pre-Search Briefing" to ensure "[e]xterior containment of the premises" and to "restrict access at entrances." Iowa City, Iowa Police Department, *General Order on Search and Seizure*, icgov.org, *available at* http://tinyurl.com/IowaCityPD.
- The Kansas City Police Department directs its officers to "maintain control of all persons present and provide security at any entrances/exits to eliminate any unauthorized persons from entering/leaving the scene." Kansas City, Missouri Police Department, *State Search Warrant Procedures*, No. 09-14, kcmo.org, *available at* http://tinyurl.com/KanCityPD.[12]

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[12] For additional police manuals discussing external threats, see Kenosha, Wisconsin Police Department, *Search of a premises with and without a warrant*, Section IV.A.4(c), kenoshapolice.com, *available at* http://tinyurl.com/KenoshaPD (mentioning the use of "Exterior security"); Scottsdale, Arizona Police Department, *Field Orders; Arrest and Search*, ScottsdaleAZ.gov, *available at* http://tinyurl.com/ScottsdalePD ("People showing up at the warrant location once entry has

Furthermore, police departments can (and do) employ specialized SWAT teams to execute high-risk warrants.[13] These teams utilize specialized training

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been made may be frisked for weapons, if there is a reasonable suspicion they are armed. They cannot be searched for contraband unless independent probable cause is developed."); Cincinnati, Ohio Police Department, *Search Warrants/Consent to Search*, C(6)(i); D(2), cincinnati-oh.gov, *available at* http://tinyurl.com/CinciPD (instructing the supervising officer to create a checklist including the number of officers needed to secure the inside and the outside of the premises, and instructing the officers to secure the perimeter before beginning the search).

[13] Some police departments specify in their rules and procedures when a SWAT team should be used: Boston, Massachusetts Police Department, *Search Warrant Execution Procedures*, CityofBoston.gov, *available at* http://tinyurl.com/BostonPD (mandating that "[t]he Boston Police SWAT Team should be utilized . . . whenever: . . . The presence of firearms is reasonably suspected"); Chicago, Illinois Police Department, *Chicago Police Department Special Weapons and Tactics (SWAT) Incidents Special Order S05-05(V)*, directives.chicagopolice.org, *available at* http://tinyurl.com/ChicagoSWAT (requiring police to consult with SWAT team supervisors before executing a warrant if, among other things, the suspect has a violent criminal history, a "large number" of suspects may be present at the location, or a "no knock" warrant has been issued); Los Angeles, California Police Department, *Department Manual* 4/742.20, lapdonline.org, *available at* http://tinyurl.com/LAPDSWAT (calling for the use of high-risk warrant procedures, which include the use of a SWAT team, for service of warrants "involving a suspect possessing exceptional weaponry or who has a documented violent history," or in other situations "that may require specialized personnel"); Minneapolis, Minnesota Police Department, *Policy & Procedure Manual 9-303*, minneapolismn.gov, *available at* http://tinyurl.com/MinnSWAT (requiring the use of a SWAT team "in all . . . situations where a 'preplanned' entry in to a building or dwelling is necessary to arrest a suspect(s) who is believed to be armed and/or

and procedures to address safety risks arising during high-risk searches. *See* Mark V. Lonsdale, *Raids: A Tactical Guide to High Risk Warrant Service* 1, 76 (1991) (providing a "guide to high risk warrant service, advanced tactical shooting and the related training requirements" and instructing law enforcement to "ensure the security and safety of the raid team" by securing the perimeter).

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In sum, no meaningful evidence supports the expansion of the rule of *Summers* to the circumstances here. The Court should refrain from adopting a new categorical rule—which undeniably would infringe upon the interests in privacy and personal security protected by the Fourth Amendment—and instead should adhere to a case-by-case analysis of the safety risk, if any, posed by individuals who have left the premises to be searched. When special threats to safety arise under particular circumstances, all indications from

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dangerous or when entry to the location may be hazardous or impeded because of warning systems, reinforced doors, or other impediments"). Other sources confirm the increased use of SWAT teams. *See generally* Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 JUST. Q. 607, 615 (1997) (empirical study documenting the increased use of SWAT/paramilitary teams in cities with twenty-five to fifty thousand residents to serve high-risk warrants); Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS., no. 1, at 1, 5–7 (1997) (empirical study documenting the increased use of paramilitary/SWAT teams in cities with fifty thousand or more residents to serve high-risk warrants).

empirical data are that the police are sufficiently trained and equipped to appropriately address them.

Since a categorical rule as to persons who have recently occupied the premises to be searched would not meaningfully promote officer safety, there is no reason to extend the detention authority approved in *Summers* to the circumstances of this case. Instead, the default mode of Fourth Amendment analysis should apply, permitting officers to take such measures as may be justified on the basis of individualized determinations made in light of all the circumstances of a given warrant's execution.

CONCLUSION

For these reasons, the Court should reverse the Second Circuit and hold that the categorical rule of *Summers* does not apply to recent occupants of the premises subject to search.

Dated: August 10, 2012 Respectfully submitted,

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